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Supreme Court of the United States

OCTOBER TERM, 1955.

No. 527

ESTATE OF HENRY M. MARKS, ET AL.,
Petitioners,

versus

R. D. MACKINTOSH, ET AL.,
Respondents,

Petition for Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit.

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ERRATA

Second full Paragraph of Page 35 of this brief should read as follows:

It has been demonstrated above that during the period between June 26, 1940, the date of both lease and compromise, and 1950, the date of the decision in *Arnold v. Sun Oil Co., supra,* that owners of interests growing out of oil and gas leases held, for substantive purposes, only personal rights subject to all equities **against their grantors.** Inasmuch as all of the absent royalty transferees herein, decided by the District Court to be indispensable, acquired their interests during that period they necessarily took those interests subject to the equities existing in favor of others against their **grantors.** If, as the Court of Appeals implies might be possible, an ultimate judgment on the merits decrees that only monetary relief be accorded respondents against the named defendants then the royalty transferees would be placed in the position of having to pay the value of the royalties received by them in the event the named defendants would not or could not. The supposed fraud, if

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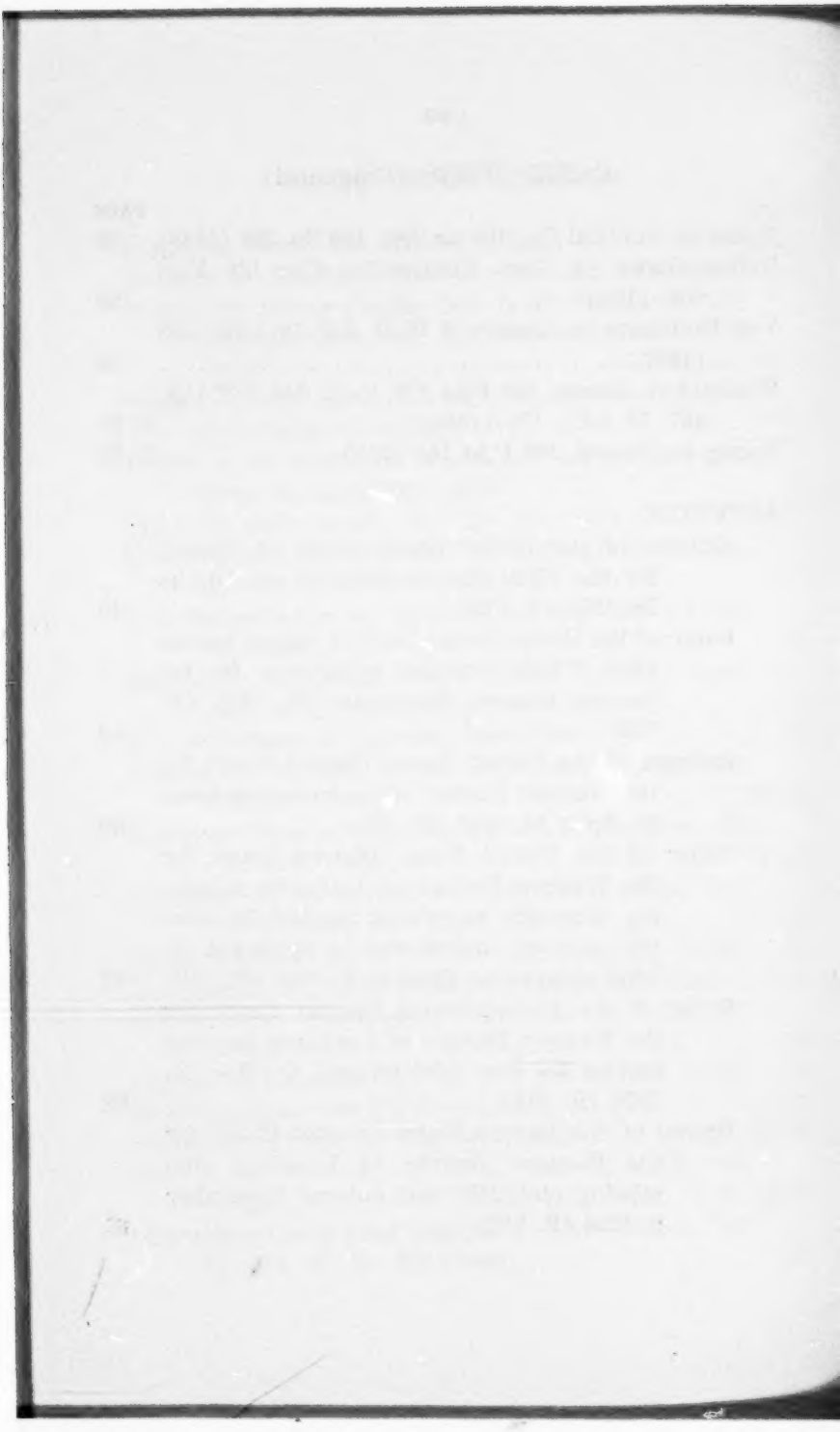

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1955.

No.

ESTATE OF HENRY M. MARKS, ET AL.,
Petitioners,

versus

R. D. MACKINTOSH, ET AL.,
Respondents,

Petition for Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit.

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes Thomas M. Wade, Jr., Kate Lacour Wade, Philip Watson, John Dale, Jr., The California Company and the Estate of Henry M. Marks and pray that a writ of certiorari issue out of and under the seal of this Court to the United States Court of Appeals for the Fifth Circuit to review the judgment of that court entered on August 26, 1955 (R. 325).

OPINIONS BELOW.

The opinion of the Court of Appeals was rendered on August 26, 1955 (R. 325) and is reported at 225 F. 2d 211 (1955). Petition for rehearing was filed on September 13, 1955 (R. 335) and was denied on September 28, 1955 (R. 362). The opinion of the District Court ordering the joinder of indispensable parties rendered on April 14, 1954, reported in 15 F.R.D. 332 (1954), is found in (R. 298). The order of the District Court requiring plaintiffs to submit their motion for a new trial and/or amendment of judgment in the District Court (R. 306) on brief entered on October 9, 1954 is found in (R. 309). The order of the District Court denying the motion of plaintiffs for a new trial for failure to submit the motion on brief as ordered entered on October 21, 1954, is found in (R. 311). The decree of the District Court dismissing the plaintiffs' suit and action entered on November 9, 1954 is found in (R. 312).

JURISDICTION.

The jurisdiction of this Court to review the case upon writ of certiorari is based upon Section 1254 (1) Title 28 of the United States Code.

The opinion of the Court of Appeals for the Fifth Circuit was filed August 26, 1955. A petition for rehearing was denied September 28, 1955. Upon motion of petitioners an order was entered by that Court recalling and staying the mandate for a period of thirty days from

October 20, 1955, pending the filing of this petition for certiorari (R. 365).

QUESTIONS PRESENTED.

(1) Whether in a suit to cancel for fraud a deed and a mineral lease, successors in interest of the parties to that deed and lease are indispensable parties where the complainants have also prayed for monetary relief.

(2) Whether the judgment of the Court of Appeals denies to Petitioners due process of law, in contravention of the Fifth Amendment to the Constitution of the United States of America by denying to Petitioners the protection of the procedural rule of indispensable parties, and by permitting respondents to remain in court by belatedly seeking to amend the gravamen of their complaint for the first time in the Court of Appeals on their appeal from a judgment of dismissal rendered by the District Court.

(3) Whether Rule 54 (c) of the Federal Rules of Civil Procedure, 28 U.S.C. warrants the judgment rendered by the Court of Appeals.

(4) Whether the construction placed upon the public registry laws of the State of Louisiana by the Court of Appeals for the Fifth Circuit requires that those laws be declared unconstitutional as violative of the prohibition against impairment of the obligations of contract contained in Article I, Section 10 of the Constitution of the United States of America.

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

This action was instituted by respondents under the authority of Section 1332(a)(3), Title 28, United States Code, providing for jurisdiction in the United States District Courts of cases involving citizens of different states where the amount in controversy is in excess of $3,000, that section provides:

> "Section 1332 (a). The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between: * * * * * * (3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

The District Court for the Western District of Louisiana ordered the respondents to join certain parties, successors in interest to the parties to a deed and mineral lease executed on June 26, 1940, on the authority of Rule 19 (a) of the Federal Rules of Civil Procedure which provides:

> "(a) Necessary Joinder. Subject to the provisions of Rule 23, and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff."

Petitioners herein contend that the decision of the Court of Appeals for the Fifth Circuit in denying to

Petitioners the protection afforded by the procedural rule of indispensable parties and by allowing respondents to amend their complaint in brief in that court constitutes a deprivation of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States of America which provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of loss; nor shall private property be taken for public use, without just compensation."

The gravamen of the original complaint in this cause was that the petitioners herein had perpetrated a fraud upon the respondents and sought to have the mineral lease and the deed of June 26, 1940 cancelled and set aside. The Court of Appeals relying upon the alternate prayers of the complaint for monetary relief cited Rule 54(c) of the Federal Rules of Civil Procedure to support its holding that the parties held to be indispensable by the District Court were not essential to this litigation. Rule 54(c) reads as follows:

> "(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.

> Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleading."

The Court of Appeals for the Fifth Circuit has placed a construction upon the public registry laws of the State of Louisiana which is unnecessary and which compels the holding that said laws are violative of Article I, Section 10 of the Constitution of the United States of America. That section provides:

> "No state shall enter into any Treaty, Alliance, or Confederation, grant letters of Marque and Reprisal, coin Money; emit Bills of Credit; make anything but gold and silver coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

The public registry laws of the state of Louisiana, Louisiana Revised Statutes of 1950 9:2721-2723 enacted originally as Act No. 7 of the Second Extraordinary Session the Legislature of Louisiana of 1950 provides:

> "AN ACT
>
> Relating to the registry laws of the State of Louisiana; requiring that all written instruments relating to or affecting immovable property be filed for registry in the parish where such immovable property is situated in order to affect third persons or third parties; redefining third persons or third parties; providing for the rights of third persons or third parties dealing with or acquiring immovable property

or real or personal rights therein; providing that this act is remedial and therefore both retroactive and prospective; providing that this Act shall not affect certain liens or privileges; providing that in the event any section, part or portion of this act should be found unconstitutional the remaining portion shall not be affected thereby; and repealing all laws or parts of laws in conflict herewith.

Section 1. Be it enacted by the Legislature of Louisiana, That no sale, contract, counter letter, lien, mortgage, judgment, surface lease, oil, gas or mineral lease or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the Parish Recorder of the parish where the land or immovable is situated; and neither secret claims or equities nor other matters outside the public records shall be binding on or affect such third parties.

Section 2. That third persons or third parties so protected by and entitled to rely upon the registry laws of Louisiana now in force and effect and as set forth in this act are hereby redefined to be and to include any third person or third party dealing with any such immovable or immovable property or acquiring a real or personal right therein as purchaser, mortgagee, grantee or vendee of servitude or royalty rights, or as lessee in any surface lease or leases or as lessee in any oil, gas or mineral lease and all other third persons or third parties acquiring any real or personal right, privilege or permit relating to or affecting immovable property.

Section 3. That this statute is remedial, and is for the benefit of all such third persons or third

parties heretofore as well as those hereafter dealing with immovables or real or personal rights therein on the faith of the public records.

Section 4. This Act shall not derogate from or otherwise affect the existence or priority of any lien or privilege which, under existing law, is not dependent upon recordation for its existence or priority.

Section 5. The provisions of this act shall be considered as separate and should any section, paragraph, sentence or any other portion hereof be declared unconstitutional, the remainder of this act shall not be affected thereby.

Section 6. All laws or parts of laws in conflict herewith, to the extent of any such conflict; are hereby repealed."

The enactment of the registry laws grew out of the judicial treatment of Act 205 of the Louisiana Legislature of 1938 which provides:

"AN ACT

Defining oil, gas and other mineral leases, and contracts applying to and affecting the right to reduce oil, gas or other minerals to possession, to be real rights and incorporeal immovable property, providing that the rights, privileges and obligations created thereby and thereunder may be asserted, protected and defended according to the laws regulating immovable property or land, and repealing all conflicting laws.

Section 1. Be it enacted by the Legislature of Louisiana, That oil, gas and other mineral leases, and contracts applying to and affecting such leases or

the right to reduce oil, gas or other minerals to possession, together with the rights, privileges and obligations resulting or flowing therefrom, are hereby defined and classified as real rights and incorporeal immovable property, and may be asserted, protected and defended in the same manner as may be the ownership or possession of other immovable property by the holder of such rights, without the concurrence, joinder or consent of the landowner, and without impairment of rights of warranty, in any action or by any procedure available to the owner of immovable property or land.

Section 2. That this Act shall apply to all such transactions whether entered into prior to the passage of this Act or not.

Section 3. That all laws or parts of laws in conflict herewith be, and the same are, hereby repealed."

That Act was amended by Act No. 6 of the Second Extraordinary Session of the Legislature of Louisiana of 1950 which provides:

"AN ACT

To amend and reenact Section 1105 of Title 9 of Louisiana Revised Statutes of 1950 relative to oil, gas and mineral leases and contracts applying to and affecting such leases or the right to reduce oil, gas and other minerals to possession and classifying such contracts as real rights and incorporeal immovable property.

Section 1. Be it enacted by the Legislature of Louisiana, That Section 1105 of Title 9 of Louisiana

Revised Statutes of 1950 be amended and reenacted to read as follows:

§ 1105. Rights under mineral leases and contracts classified as incorporeal immovables

Oil, gas, and other mineral leases, and contracts applying to and affecting these leases or the right to reduce oil, gas, or other minerals to possession, together with the rights, privileges, and obligations resulting therefrom, are classified as real rights and incorporeal immovable property. They may be asserted, protected, and defended in the same manner as may be the ownership or possession of other immovable property by the holder of these rights, without the concurrence, joinder, or consent of the landowner, and without impairment of rights of warranty, in any action or by any procedure available to the owner of immovable property or land. This act shall be considered as substantive as well as procedural so that the owners of oil, gas and other mineral leases and contracts within the purpose of this statute shall have the benefit of all laws relating to the owners of real rights in immovable property or real estate.

Section 2. All laws or parts of laws in conflict herewith, to the extent of such conflict, are hereby repealed."

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This petition for a writ of certiorari grows out of litigation originally commenced by respondents herein in

the United States District Court for the Western District of Louisiana. Their complaint alleges that The California Company, acting through its agents, and in consort with one Henry M. Marks, whose executrix is one of the petitioners herein, confected and carried into execution a scheme to defraud respondents of "all of the land and most of the minerals" which composed what is known as Gum Ridge Plantation in Tensas Parish, Louisiana. The jurisdiction of the District Court was based upon allegations of diversity of citizenship and the requisite jurisdictional amount. Upon the face of the complaint complete diversity existed (R. 2, 3). Thereafter defendants filed various pleas supported by documentary evidence based upon the absence of indispensable parties (R. 199, 248, 261, 271, 293). The District Court found the pleas good and dismissed plaintiffs' (respondents') suit.

Appeal to the United States Court of Appeals for the Fifth Circuit was taken by plaintiffs (respondents) and that court reversed the District Court (R. 325).

The prayer for relief contained in the original complaint (R. 2) demanded (1) the cancellation of the oil, gas and mineral lease and the act of compromise and conveyance, both dated June 26, 1940; (2) the return of all royalties paid to Henry M. Marks and his grantees, Thomas M. Wade, Jr., Mrs. Kate Lacour Wade, John Dale, Jr. and Philip Watson together with the return of the property received by Dale, Wade and Watson from Marks and by Mrs. Wade from Mr. Wade; (3) the value of all minerals extracted from the property, subject to the cost of drilling and production; (4) the value of any interest which could

not be returned; and (5) reasonable attorneys fees and exemplary damages in the amount of $100,000.00.

The pleas calling for the joinder of indispensable parties and in default thereof for the dismissal of the suit, referred to above, were supported by documentary evidence setting forth the names, addresses and citizenships of the transferees from both petitioners and respondents of mineral and royalty interests in the property in question.

The District Court in its opinion of April 14, 1954, (R. 298), decided that the transferees of the parties to the deed and lease were indispensable to this action. That judgment ordered respondents to make all such transferees parties to the suit within twenty days. Respondents did not join those parties and on April 27, 1954 filed a motion for a new trial or amendment of judgment (R. 306). More than five months later, after respondents had failed in any way to support that motion, the District Court ordered respondents to submit the motion on brief by October 20, 1954 and upon their faliure so to do entered its order denying the motion on October 21, 1954 (R. 311). Thereafter on November 9, 1954 the District Court dismissed the suit (R. 312).

The Court of Appeals in its decision reversing the judgment of the District Court relied upon Rule 54 (c) of the Federal Rules of Civil Procedure stating that the "court can properly render judgment either for or against each of the defendants without directly affecting persons who are not parties to the suit" (R. 328). The court

stated that the respondents had abandoned their attack on the mineral lease (R. 327). Upon this basis the Court of Appeals concluded that the unjoined transferees of mineral and royalty interests were not indispensable parties as they were protected by the public registry laws of the State of Louisiana.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In failing to hold that the transferees of mineral and royalty interests of both petitioners and respondents are indispensable parties in this proceeding.

REASONS FOR GRANTING THE WRIT.

This case presents an important question of procedural principle in regard to the application of the Federal Rules of Civil Procedure when there is involved an attack upon the validity of instruments which are the foundation of subsequent interests created through transfers by the original parties.

The decision rendered by the United States Court of Appeals for the Fifth Circuit on August 26, 1955 in effect declares that interests of mineral and royalty owners who deraign their title from parties to an act of compromise and conveyance, which was in fact a transfer of the whole

interest and a reconveyance of a mineral interest, are not affected by an attack upon that act of compromise and conveyance and upon the mineral lease seeking cancellation of those contracts.

This question has not heretofore been decided by this Court, although the factors to be considered in a determination of the indispensability of parties were set forth by this Court in *Shields v. Barrow*, 17 How. 130, 15 L.Ed. 158 (1855) and have been followed continuously for the last 100 years by the United States District Courts and by the United States Courts of Appeals. This Court and the inferior Federal Courts have uniformly held, until now, that parties whose interests derive from a contract are essential in any litigation which seeks to have that contract rescinded. The present decision is in conflict with the applicable decisions of this Court and those of the Court of Appeals for the Sixth Circuit as announced in *Kentucky Natural Gas Corporation v. Duggins*, 165 F. 2d 1011 (1948).

The decision of the Court of Appeals will have immediate importance far beyond the particular facts and parties involved in this suit as it lays the predicate for the instigation of litigation against less than all required parties in the federal courts rather than in state courts.

The judgment permits the appellants to escape an adverse judgment below on the basis of an amendment of the theory of their complaint advanced for the first time in brief in this Court; and is in that respect directly contrary to:

(a)

The decision of this Court in *Shields v. Barrow, supra:*

> "A bill may be originally framed with a double aspect, or may be so amended as to be of that character. But the alternative case stated must be the foundation for precisely the same relief; and it would produce inextricable confusion if the plaintiff were allowed to do what was attempted here."
>
> "Nor is a complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment."

(b)

The decision of the Eighth Circuit Court of Appeals in *Gutensohn v. Kansas City Southern Railway Company, et al.*, 140 F. (2d) 950 (Eighth Circuit—1944):

> "Certainly a petition cannot be amended, after a motion to dismiss has been sustained, by enlarging in a brief the theory which the petition presents."

The decision of the Court of Appeals erroneously applies Rule 54 (c) of the Federal Rules of Civil Procedure.

The decision sought to be reviewed applies the public registry laws of the State of Louisiana in such a way as to unnecessarily require that they be stricken as violative of Article I, Section 10 of the Constitution of the United States of America.

The contracts involved in this litigation were executed by Henry M. Marks, whose executrix is a petitioner herein, and by respondents on June 26, 1940 and are con-

tained in the record (R. 15, 27). Through the act of compromise R. D. Mackintosh, Mrs. Alice Carmichael Mackintosh, Guy R. James, Dora B. James, Emily Lee Graham, Charles L. Graham, and Amanda E. Smith compromised a title controversy with Henry M. Marks as to the ownership of lands located in Tensas Parish, Louisiana. That contract was a conveyance to Henry M. Marks of all of the land in fee simple and a reconveyance by him of one-half of all minerals thereunder to Mackintosh, et al. That deed recited that it should inure to the benefit of and be binding upon the heirs, successors and assigns of the parties thereto.

After the deed was executed all parties to it joined in an oil, gas and mineral lease in favor of the California Company (R. 277).

Thereafter commercial production of oil was obtained on the property by the California Company. During the ensuing years the parties to the agreements sold mineral and royalty interests thereunder to such other persons as: Mrs. Nan M. Harris (of Missouri); T. E. Mackintosh (of Missouri); Sue Dale Newton (of Louisiana); Dorothy Dale Reeves (of Louisiana); Joseph Stein (of Mississippi); J. Balfour Miller (of Mississippi); Ralph A. Johnston (of Texas); and E. P. Wingfield (of Texas).

When this suit was brought the respondents did not join as parties some twenty-six persons who had acquired mineral and royalty interests in the same land, since 1940 and prior to the commencement of this suit, whose title rests upon the compromise and who have derived production revenues from the mineral lease.

The interests of these third parties was established in the District Court by documentary evidence which was uncontroverted which supports the findings of fact made by the District Court (R. 304) that among these transferees are residents and citizens of Texas, Missouri, Louisiana and Mississippi. Motions for summary judgment based on non-joinder of indispensable parties and want of jurisdiction were filed by petitioners. Respondents submitted no briefs in opposition to these motions.

If these interested parties are aligned as either plaintiffs or defendants diversity would be destroyed. The issue which was drawn, then, for the District Court was whether or not these mineral and royalty transferees were indispensable to the continuance of the cause.

An examination of the interests held by these third parties clearly reveals their interest in both the lease and the compromise of title. Some hold mineral interests from Marks and his transferees Dale, Wade and Watson. If declaration is ultimately made of the invalidity of the compromise of title and it is consequently set aside there can be no doubt that these parties have been "affected".

Excluded from the test of indispensability of parties is any consideration of whether or not a decree would be technically binding upon the absent parties. In *Keegan vs. Humble Oil & Refining Company*, 155 F. 2d 971 (1946) it was said at page 973:

> "The fact that the decree would not be binding on the absent parties is not the controlling factor."

The mineral transferees of Marks hold rights based on the compromise deed not dependent for their validity on the lease. They hold under Louisiana law a servitude —a real right.

The Court of Appeals finds that the owners of this type of interest are not indispensable because they are protected by the public registry laws of the State of Louisiana. Suffice it to say in answer that this view removes the status of their ownership from one based upon a valid deed to one which has no basis whatsoever and relegates them, without an opportunity of being heard, to the defensive armament afforded by the registry laws. The fact is that their interests would be adversely affected.

This Court in *Shields v. Barrow*, 17 How. 130, 15 L.Ed. 158 (1855) stated:

> "We know of no exception to the rule that an instrument cannot be destroyed totally by a decree unless all parties to it, *or their successors in interest*, are before the court" (Emphasis added).

This concept has been followed by the Court of Appeals for the Fifth Circuit consistently until the present decision and has also been followed by the Court of Appeals for the Sixth Circuit. The court below is *Calcote v. Texas Pacific Coal & Oil Company*, 157 F. 2d 216, Cert. den. 329 U.S. 782, 67 S.Ct. 205 (1946) stated:

> "To say that it is useless to inquire into the question of indispensable parties in diversity cases, where a substantial claim is stated in the complaint, is almost the same as saying that it is a waste of time for the

court to look into its own jurisdiction. In Mallow v. Hinde, 12 Wheat. 193, 198 6 L.Ed. 599, the court indicated that it might put its decision upon lack of jurisdiction or upon a much broader ground. It said:

> "'We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's rights, without the party being either actually or constructively before the court.'"

What was there said in regard to the mineral rights is applicable here for the "royalty" there referred to is the same interest referred to in this litigation as "mineral" interest granted under the deed. The court said:

> "By separate royalty deeds, as we have seen, the Calcotes sold and conveyed unto their said several grantees not only an undivided interest in the royalty carved out of the present lease but also in a royalty to be carved out of all future mineral leases as well as out of any mineral production by the owners. Whatever estate in the minerals was acquired by virtue of the present lease vested in praesenti. The right to receive a portion of the minerals produced under the lease was also a vested interest in praesenti distinct from the royalty created prior to future leases and future production. The absent royalty owners not only have a distinguishable legal interest in praesenti but a distinct vested interest in futuro; and there can be no enjoyment of the latter estate until the termination of the former. The cancellation of the present lease would destroy their vested inter-

> est in praesenti, whereas a declaration of its validity would either destroy absolutely their vested interest in futuro or postpone the enjoyment of it indefinitely. Vested interests of absent parties, therefore, will be directly and vitally affected regardless of the outcome of this litigation."

If the deed here in question is set aside the right of absent mineral transferees of Marks will be affected in that their right to share in production under future leases will be cast in doubt. It is immaterial that this event may be delayed by the fact of present commercial production. The defense of the registry laws ascribed as a preventative is a relegation to shadow rather than to substance. As the court properly stated in the *Calcote* case, *supra:*

> "The fact that there interests may not have been prejudicially affected by the final judgment below, which was rendered after a trial on the merits, is not controlling, because the question of indispensable parties, and particularly of diversity jurisdiction, does not depend upon the result of the suit."

The implication, whether valid *or* erroneous, of the Court of Appeals that an ultimate decree on the merits might not call for a cancellation of the deed under the doctrine of *Seeley v. Cornell*, 74 F. 2d 353 (1934) does not alter the fact that the interests of the mineral transferees of Marks are affected and that they are indispensable parties.

The same situation applies to the mineral grantees of the respondents, though it may be said that their warranty of title would protect them, for the deed under which they

hold was a transfer by Mackintosh, et al., to Marks and *conveyance* back by him of an undivided one-half of the minerals. If the ultimate decree on the merits were to cancel the compromise of title all of the rights and equities there set at rest would then be thrown into litigation.

Respondents in their reply brief in the Court of Appeals stated at pages 2 and 6 that the claims of Marks were at issue here and in this suit. They state that Marks had no title whatsoever. These references to the merits obviously swayed the Court of Appeals as is shown by the language used by the court in its opinion (R. 326) wherein the court states that "*Actually,* Marks had no title whatever to the property * * *" and "* * * plaintiffs * * * who continued to be the owners thereof *certainly* until June 26, 1940," but these statements do not show that Marks did not have interests in the land which were the subject of compromise. There has been no trial on the merits and petitioners have refrained from presenting factual arguments to the courts.

The mineral transferees of respondents would, then, be subject to attack on the ground of lack of title and relegated to calling their vendors in warranty or to defending under the registry laws of the State of Louisiana. That these parties may be successful in such defenses and that therefore, as the Court of Appeals held, they are not indispensable is not the purpose of Rule 19 (a) of the Federal Rules of Civil Procedure. While it is true that the Rules were intended to liberalize and broaden federal practice and to eliminate cumbersome and unnecessarily restricted procedures, the Rules were not intended to, nor

should a construction be allowed to stand which, in effect, broadens the base of the federal judicial power. This power is limited by the Constitution of the United States by virtue of Article III, Section 2 to:

> "Controversies; * * * between Citizens of different states."

The Federal Rules of Civil Procedure were designed to facilitate not spread the exercise of that power. The construction placed upon the Rules by the Court of Appeals will have the effect of "expanding that idea measurably".

In *Young v. Powell*, 179 F. 2d 147 (1950) the Court of Appeals for the Fifth Circuit held that despite the fact that judgment on the merits was favorable to absent parties that the motion for dismissal for lack of indispensable parties should have been sustained. The decision amply points to the enlargement of the scope of federal judicial power that will result if the decision of the Court of Appeals here called for review is allowed to stand. At page 152 the court said:

> "The slightest consideration will show that if appellee were right in the view he takes, that the relief granted, rather than that asked, determines indispensability, the whole doctrine and the equitable basis on which it rests would be gone by the board.
>
> "Such view would permit the continual harassment of the defendant by successive suits brought singly by interested parties, each in the interest of them all, for cancellation with no protection, in case the

> defendant wins, from successive suits by the others who had not been made parties, while in case he lost in the first suit, his complaint that he ought not to have suffered a judgment in favor of persons who were not sued, would be met by the cynical view, 'Well, those who ought to have been in the suit haven't suffered because their interests have prevailed, and having lost the suit, it doesn't lie in your mouth to complain that they got the benefit of a suit to which they were not made parties'."

The separation of the interests of mineral transferees from that of the royalty transferees which respondents desire to establish, and which the Court of Appeals erroneously conceded, is unreal. The rights of the third parties are more dependent upon the deed than on the lease.

Prior to this decision the Court of Appeals for the Fifth Circuit had consistently construed the rule of indispensable parties to mean that no instrument could be destroyed by a decree unless all parties to it and their successors in interest were before the court. *Keegan vs. Humble Oil & Refining Company, supra; Calcote vs. Texas Pacific Coal & Oil Company*, 157 F. 2d 216, Cert. den. 329 U.S. 782, 67 S.Ct. 205 (1946); *Young vs. Powell*, 179 F. 2d 147 (1950); *Warfield vs. Marks*, 190 F. 2d 178, Cert. den. 342 U.S. 887, 72 S.Ct. 176 (1951); *Baten vs. Nona-Fletcher Mineral Company*, 197 F. 2d 629, Cert. den. 344 U.S. 861, 73 S.Ct. 104 (1952).

The Court of Appeals for the Sixth Circuit had established its jurisprudence in line with the prior rulings of

the Fifth Circuit in *Kentucky Natural Gas Corporation vs. Duggins,* 165 F. 2d 1011 (1948). In that case an oil, gas and mineral lease was cancelled for fraud by the District Court. Motions calling for dismissal for lack of indispensable parties were filed and overruled. The Court of Appeals for the Sixth Circuit reversed. In the opinion at page 1016 the court said:

> "The general rule seems well settled both by Federal law and Kentucky law that in an action to rescind a contract all of the parties to the contract are indispensable parties."

The Court said further:

> "Delia Spencer, as the owner of the land, was the real lessor. There was but one contract between her and the lessee. It either stands or falls as a single unit. If she had brought the suit the lease could not have been declared one-fifth invalid and four-fifths valid."

That there can be no distinction in the application of the rule of indispensable parties between the contract of lease and the contract of compromise is made clear by the following language from the *Calcote* Case, *supra:*

> "Therefore no decree can be entered in this case in accordance with the prayer of the complaint without annulling the vested rights of absent parties whose presence might deprive the court of jurisdiction. The leasing contract was an entirety, and from its nature could not be cancelled as to the Calcotes and allowed to stand as to the other royalty owners. The lessors and their grantees were, technically and beneficially, joint owners of a com-

> mon property, each with an undivided interest in every particle of the minerals. None of them owned a singled molecule in severalty. The relation of the royalty grantees to the controversy over the validity of this lease was so direct and vital that no adequate judgment could be entered without affecting their interests."

Nothing stated in the body or prayer of respondents complaint can alter the fact that the contract of compromise was a deed to them of an *undivided* one-half of the minerals. There was thus nothing separable just as there was nothing separable in the Calcote lease. The rule enunciated by these cited precedents applies to both contracts. The decree of the Court of Appeals leaves the case immeshed in all of the controversies set at rest by the contract of compromise. It does not follow that the absent parties will not be vitally affected if monetary relief is granted after a trial.

We have demonstrated that the mineral transferees of both respondents and petitioners are indispensable to this cause. Even more so are the royalty transferees. These absent parties hold the right to receive revenues from the production of oil, gas and other minerals under the present lease established by respondents and Marks as lessors with the California Company as lessee. That is the extent of their right.

The cancellation of the lease was sought in this action (R. 2-12). Under any view of the pleadings the cancellation of this lease remained a part of respondents' cause until the filing of the motion for new trial or amend-

ment of judgment. It was on this posture of the case that the District Court judge, the Honorable Ben C. Dawkins, Jr., rendered the opinion of April 15, 1954 ordering the joinder of parties indispensable.

The entire framework of the majority opinion in the Court of Appeals is based on the erroneous claim made by respondents in brief in that court, for the first time, that the case as presented to the Court of Appeals did not contain an attack on the lease which sought its cancellation. Respondents *stated*, and the court accepted the statement, that they had abandoned their attempt to have the lease cancelled in their motion for new trial or amendment of judgment on the strength of *Calcote v. Texas Pacific Coal & Oil Co.*, 157 F. 2d 216 (1946), *Keegan v. Humble Oil and Refining Co.*, 155 F. 2d 971 (1946) and *Warfield v. Marks*, 190 F. 2d 178 (1951).

The language of that motion is as follows (R. 306):

> "That since the claims against the other defendants, except The California Company, do not involve the setting aside of the mineral lease to give them validity, and since there is a claim for a money judgment against the California Company, the decree of this Court which is based entirely upon the proposition that a mineral lease cannot be set aside without making all of the people affected by it parties to the suit is not pertinent to the claims for the return of plaintiffs' property, for the mineral interests thereunder and for reimbursements or accounting to the plaintiffs of the value of the royalties paid, nor is it applicable to the claim for an account-

> ing against The California Company for the minerals which they have withdrawn from the land."

Nowhere in this language can be found an abandonment of the attack upon the mineral lease. The trial court considered this motion (R. 310) and ordered respondents to submit the motion on brief. It is apparent that the trial judge did not consider the relief of cancellation of the lease abandoned.

The Court of Appeals has allowed an unheard of procedure by permitting respondents to amend its complaint in brief in that court after a refusal to do so below and have denied to petitioners that procedural due process of law guaranteed by the Fifth Amendment to the Constitution of the United States of America:

> "The right of a litigant to a trial *in accordance with the forms of law*, and with an opportunity to present his claims or defense, if he desires to do so, *is a vital part of due process.*" (Emphasis added)
>
> *Ackerman v. United States*, 178 F. 2d 983 (1949) Aff'd, 340 U.S. 193, 71 S.Ct. 209 (1950).

To permit such amendment here is to excuse neglect under the guise of the "modern" approach to the application of the Federal Rules of Civil Procedure not warranted and in the words of Chief Judge Hutcheson to "put the district judge in error and the defendants to the cost of this appeal" allows the review of a case that was not before the District Court.

It was from this erroneous line of departure that the Court of Appeals proceeded to build the framework of its

decision. With the lease cancellation disposed of the court then implied that on the basis of *Seeley v. Cornell, supra,* and Rule 54 (c) of the Federal Rules of Civil Procedure relief could be granted on the remaining prayers of respondents.

The application of Rule 54 (c) by the court to a jurisdictional question is certainly the equivalent of lifting oneself by one's own bootstraps. It is further a misapplication of the use designed for the rule which was to allow, and in fact make it the duty of the courts to grant, that relief to which a party had shown himself entitled after a trial on the merits based on the pleadings as presented. Respondents so-called "abandonment" of prayers for cancellation of the lease were ineffective to alter the case presented to the Court of Appeals for review. Rule 54 (c) was not designed to nor can it be utilized to enlarge the jurisdiction of the federal judiciary. If on trial respondents show they are entitled to relief their prayers cannot be controlling, however, the rule is not jurisdictional and it is error for the federal court to strain to maintain its jurisdiction when all of the issues presented are controlled by and can be fully disposed of by the application of State law. *Fouke v. Schenewerk,* 197 F. 2d 234 (1952), *Ring v. Spina,* 148 F. 2d 647 (1945), *United States v. Zara Contracting Co.,* 146 F. 2d 606 (1944), *Blazer v. Black,* 196 F. 2d 139 (1952).

However, even assuming, for the purposes of argument, that the Court of Appeals is correct in its finding that respondents had abandoned the relief of cancellation of the mineral lease properly and that it was correct in its ap-

plication of Rule 54 (c) of the Federal Rules of Civil Procedure, it is in error in its judgment that the royalty transferees are not indispensable to an action seeking the cancellation of the compromise deed of June 26, 1940, or for the value of minerals extracted or royalty received. The Court adopted verbatim the statements of respondents on this point (R. 329). Respondents there plead that they do not seek to affect the title of such royalty owners. The cancellation of the compromise deed will have exactly that effect. The registry laws of the State of Louisiana do not afford these parties the protection claimed for them by respondents. The construction given these laws by the Court of Appeals results in an unconstitutional interpretation unwarranted under the circumstances.

Act No. 7 of the Second Extraordinary Session of the Legislature of Louisiana of 1950, which became Louisiana Revised Statute 9:2721-2723, was the culmination of a long history of attempts by litigating parties to have the rights growing out of oil and gas leases accorded that same inviolate status that had been accorded rights in minerals since the jurisprudence of Louisiana became settled on the point that such mineral rights were servitudes and therefore incorporeal immovables, *Frost-Johnson Lumber Co. v. Sallings Heirs*, 150 La. 756, 91 So. 207 (1922), Louisiana Civil Code of 1870, Articles 533, 646, 647, which are to be treated as all other immovable property under the then existing registry laws, Louisiana Civil Code of 1870, Article 2266.

In 1938 the legislature of the State of Louisiana enacted a statute in order to overcome the ruling of the Supreme Court of Louisiana in *Gulf Refining Co. v. Glassell*, 180 La. 190, 171 So. 846 (1936) to the effect that rights created by a mineral lease are personal and hence insufficient to support a real action by a lessee. Act 205 of 1938 provided as follows:

> "Section 1. Be it enacted by the Legislature of Louisiana, that oil, gas and other mineral leases, and contracts applying to and affecting such leases or the right to reduce oil, gas or other minerals to possession, together with the rights, privileges and obligations resulting or flowing therefrom, are hereby defined and classified as real rights and incorporeal immovable property, and may be asserted, protected and defended in the same manner as may be the ownership or possession of other immovable property by the holder of such rights, without the concurrence, joinder or consent of the landowner, and without impairment of rights of warranty, in any action or by any procedure available to the owner of immovable property or land.
>
> "Section 2. That this Act shall apply to all such transactions whether entered into prior to the passage of this Act or not.
>
> "Section 3. That all laws or parts of laws in conflict herewith be, and the same are, hereby repealed."

This act in the ensuing years, *the years here pertinent*, was consistently held to be remedial and procedural by the Supreme Court of Louisiana. *Allison v. Maroun*, 193 La. 286, 190 So. 408 (1939), *Tyson v. Surf Oil Co.*, 195

La. 248, 196 So. 336 (1940), *Amerada Petroleum Corporation v. Reese,* 195 La. 359, 196 So. 558 (1940), *Coyle v. North American Oil Consolidated,* 201 La. 99, 9 So. 2d 473 (1942).

In 1950 the Supreme Court of Louisiana in *Arnold vs. Sun Oil Co.,* 218 La. 50, 48 So. 2d 369 reiterated the view that mineral leases must be construed as ordinary leases and that equities running in favor of third persons were not cut off by registry under Act 205 of 1938. The court specifically struck down a plea in bar based upon that act urged by lessees under an oil and gas lease.

It is to be noted that the quoted provisions of the act set forth that it "shall apply to all such transactions whether entered into prior to the passage of this Act or not." The court in *Arnold vs. Sun Oil Co., supra,* said:

> "Mineral leases must be construed as leases, and the codal provisions applicable to ordinary leases must be applied. See Tyson v Surf Oil Co., and Coyle v North American Oil Consolidated, both cited supra. Accordingly, since Murphy and Sun Oil Company have no greater rights than those of their lessors, their co-defendants herein, they must be held to an accounting to Effie Dexter Arnold to the extent of her interest in the event of a final judgment in favor of plaintiffs."

The original opinion was rendered by Judge Rene A. Viosca of the Civil District Court for the Parish of Orleans, sitting as Justice ad hoc. On rehearing the Chief Justice said at page 144:

> "The learned Justice ad hoc, relying on the well established jurisprudence of this court, very aptly

pointed out that the provisions of the Revised Civil Code with respect to the law of registry, Articles 2251-2266, have no application in this case for the reason 'that the usual oil and gas lease with a cash or royalty consideration, or both, such as the one presently before us, is a contract of letting and hiring within the meaning of the codal articles, and that the lessee in such a mineral lease obtains an obligatory or personal right only, and not a servitude on the realty or a real right in the land.'"

and further at page 148:

"It is true that upon the adoption of Act No. 205 of 1938 mineral leases and similar contracts were classified as 'real rights' and 'incorporeal immovable property,' but this classification extends no further than a grant to mineral lessees of the right to avail themselves of any procedural remedy that may be available to the owner of the realty in the protection and defense of such rights as the lessor legally conveyed to them. As this court in the original opinion stated this proposition, the jurisprudence since the adoption of Act No. 205 of 1938 has been that the act is 'remedial and procedural in character, and that it has not affected or changed any of the substantive rights flowing from the execution of mineral leases.' See, Allison v Maroun, 193 La. 286, 190 So. 408; Tyson v Surf Oil Co., 195 La. 248, 196 So. 336; Amerada Petroleum Corp. v Reese, 195 La. 359, 196 So. 558; Coyle v North American Oil Consolidated, 201 La. 99, 9 So. 2d 473.

"It therefore follows that the provisions of Act No. 205 of 1938 do not confer upon Murphy and Sun Oil Company such a substantive right in the realty

that they may, by reliance upon the public records, acquire a greater right than an ordinary lessee could acquire and a greater right, in fact, than their lessor possessed."

In order to avoid the effect of this decision the legislature of the State in 1950 passed two acts. The first, Act No. 6 of the Second Extraordinary Session of the Legislature of Louisiana of 1950, amended and reenacted Act 205 of 1938 which had become Section 1105 of Title 9 of the Louisiana Revised Statutes of 1950. That Act provided:

"Section 1. Be it enacted by the Legislature of Louisiana, that Section 1105 of Title 9 of Louisiana and Revised Statutes of 1950 be amended and reenacted* to read as follows:

§1105. Rights under mineral leases and contracts classified as incorporeal immovables.

Oil, gas, and other mineral leases, and contracts applying to and affecting these leases or the right to reduce oil, gas, or other minerals to possession, together with the rights, privileges, and obligations resulting therefrom, are classified as real rights and incorporeal immovable property. They may be asserted, protected, and defended in the same manner as may be the ownership or possession of other immovable property by the holder of these rights, without the concurrence, joinder, or consent of the landowner, and without impairment of rights of warranty, in any action or by any procedure available to the owner of immovable property or land. This act shall be considered as substantive as well as procedural so that the owners of oil, gas and

other mineral leases and contracts within the purpose of this statute shall have the benefit of all laws relating to the owners of real rights in immovable property or real estate.

"Section 2. All laws or parts of laws in conflict herewith, to the extent of such conflict, are hereby repealed."

This enactment removed from the prior act the retroactive provision found therein.

The second, Act No. 7 of the Second Extraordinary Session of the Legislature of Louisiana of 1950, is the statute relied upon by respondents and the Court of Appeals to sustain their position that the absent royalty transferees are not indispensable parties. That act, set forth hereinabove, provides for a redefinition of the parties entitled to protection to include:

"* * * any third person or third party dealing with any such immovable or immovable property or acquiring a real or personal right therein as purchaser, mortgagee, grantee, or vendee of servitude or royalty rights, * * *"

Section 3 of the statute provides that it is *remedial* and both *retroactive* and prospective.

This was, of course, a further attempt to avoid the decision in *Arnold v. Sun Oil Co., supra,* and insofar as it applies prospectively it is perfectly valid. Neither can the validity of the act be called insofar as its retroactive aspect affects purely remedial maters. However, where an application of the provisions of the act is made

in such a way as to trench upon matters of substance that application must be avoided or the act must be held unconstitutional as an enactment impairing the obligation of contract in contravention of Article I, Section 10 of the Constitution of the United States of America.

The application of that statute by the Court of Appeals in this instance has exactly that effect and should be avoided by this Court. Such avoidance will necessarily reveal the indispensability of the absent royalty transferees to a cancellation of the compromise of title here involved or to the grant of any monetary relief to respondents.

It has been demonstrated above that during the period between June 26, 1940, the date of both lease and compromise, and 1950, the date of the decision in *Arnold v. Sun Oil Co., supra*, that owners of interests growing out of oil and gas leases held, for substantive purposes, only personal rights subject to all equities in favor of their grantees. Inasmuch as all of the absent royalty transferees herein, decided by the District Court to be indispensable, acquired their interests during that period they necessarily took those interests subject to the equities existing in favor of others against their grantees. If, as the Court of Appeals implies might be possible, an ultimate judgment on the merits decrees that only monetary relief be accorded respondents against the named defendants then the royalty transferees would be placed in the position of having to pay the value of the royalties received by them in the event the named defendants would not or could not. The supposed fraud, if

found on the merits to be a fact, would permit respondents to seek recovery wherever possible. As shown above royalty owners could not successfully plead the public registry laws for, as applied here, those laws take away from respondents substantive rights thus impairing their right to recover for fraud arising out of the contract of compromise of title. That the Court of Appeals has said the registry laws protect these royalty transferees would be no solace to them in such an event. They are affected by this litigation and are indispensable.

That the elimination of or grant of a new right is not remedial has been long settled under the law of Louisiana. *Paulsen v. Reinecke*, 181 La. 917, 160 So. 629 (1935), *Hoa v. LeFranc*, 18 La. Ann. 393 (1866), *Fouchaux v. Board of Com'rs of Port of New Orleans*, 65 So. 2d 430 (1953), *Shreveport Long Leaf Lumber Co. v. Wilson*, 195 La. 814, 197 So. 566 (1940). To give a remedial statute a construction which permits substantive rights to be affected would impair its constitutionality. *Barber Asphalt Paving Co. v. Bouny*, 140 Orl.App. 104 (1917).

This Court has maintained that the sanctions accompanying contract obligations are part of the constitutional concept of "impairment of contract", *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L.Ed.403, (1867), *Bronson v. Kinzie*, 1 How. 311, 11 L.Ed.143 (1843), *McCraken v. Hayward*, 2 How. 608, 11 L.Ed.397 (1844), *Louisiana ex rel Ranger v. New Orleans*, 102 U.S. 203, 26 L.Ed.132, (1880). There is present in Act No. 7 of the Second Extraordinary Session of the Louisiana Legislature of 1950 no

time period within which possible equities such as are here involved can be brought to suit which would save the statute under the application given to it by the Court of Appeals.

This construction of the act is not necessary to the proper adjudication of this cause. That the royalty transferees could not plead the registry laws in bar of any action by respondents to recover either the value of the royalty received by them or the interest thus conveyed is obvious, but the Court of Appeals need only recognize this fact and declare these parties' interests to be affected under the clear intendment of the doctrine of *Shields v. Barrow, supra,* and such a construction necessarily disappears. The statute can operate retrospectively as to remedial matters. It was stated to be remedial by the legislature and should not be strained into unconstitutional paths.

That the royalty transferees not joined will be vitally affected is we believe clear. An award of monetary damages to respondents on any claim will necessarily carry with it doubt as to the status of those interests as will a cancellation of the deed upon which their personal rights depend. As was said in brief below respondents are attempting to *dig up the roots without moving the tree.*

The Court of Appeals cited Seeley v. Cornell, 74 F. 2d 353 (1934) for the proposition that the deed need not be cancelled in order for the court to grant monetary relief. We have demonstrated above that this is not an accurate

estimate of the present case, nor does that case stand for the cited proposition. *Seeley v. Cornell* did not involve interests as inextricably intertwined as does this case. There plaintiffs sought the recovery of a 2/9ths undivided interest in an estate which they alleged had been taken from them by fraud. The plaintiffs there had inherited their interests from their mother. The parties claimed to have been indispensable were the other heirs owning the remaining 7/9ths interest in the estate.

The interests of the parties plaintiffs and those of the remaining heirs were clearly separable. The only deeds sought to be set aside were those between plaintiffs and Cornell their representative. The cancellation of the deed and judgment whereby Cornell acquired the whole interests of the estate were not sought. The court there could properly grant the relief of an accounting without setting aside these other deeds for all parties in any way affected thereby were before the court. That is not the case in the present litigation.

CONCLUSION.

The petition for certiorari should be granted in order that this Court may review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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APPENDIX 1.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 15483.

R. D. MACKINTOSH, ET AL.,
Appellants,

versus

ESTATE OF HENRY M. MARKS, ET AL.,
Appellees.

Appeal from the United States District Court for the Western District of Louisiana.

(August 26, 1955.)

Before HUTCHESON, Chief Judge, and RIVES, and TUTTLE, Circuit Judges.

RIVES, Circuit Judge: A troublesome question concerning indispensable parties must be decided on this appeal. Jurisdiction was based solely on diversity of citizenship. The requisite diversity existed between the parties

to the original complaint, but the district court dismissed the suit for failure of the plaintiffs to comply with the court's order that they join additional parties, whose joinder would have defeated the jurisdiction of the court.

The case made by the complaint is briefly as follows. On July 1, 1930, a deed vested an absolute or fee simple title to the "Gum Ridge Plantation" consisting of 260 acres of land in Tensas Parish, Louisiana, in the plaintiffs or their ancestors in title by blood or affinity, who continued to be the owners thereof certainly until June 26, 1940. At that time, so it was alleged, a scheme to defraud, devised and confected by Henry M. Marks and The California Company, was carried into execution. The scheme contemplated that the agents and employees of The California Company would represent to the "owners" that their title to the property was fatally defective, but that if they, the "owners" of the property, would convey it to Henry M. Marks, he would re-convey to them a one-half interest in the minerals, and that The California Company would then take a joint mineral lease from the "owners" and from "Marks" and would pay the "owners" one-half of the rentals and one-sixteenth of any production from the property. The "owners" at that time lived more than five hundred miles away from the property. Actually, Marks had no title whatever to the property nor was he in possession thereof, but it was a part of the scheme that by using an employee and representative of The California Company, a major oil company, the "owners" would be lulled into a belief that the statements made to them were true.

> "On June 26, 1940 the representatives and employees of the defendant, The California Company, called upon the 'owners' with two documents, one being a contract, grant, agreement and act of compromise[1] and the other an oil, gas and mineral lease and by making the false representations which were a part of the contemplated scheme and which representations were to the effect that Henry M. Marks had a title to the property and that the title of Henry M. Marks was superior to any title which the 'owners' had, they induced the 'owners' to sign both the act of compromise and the mineral lease".

In consideration of legal services rendered in connection with the transaction, Marks made transfers to defendants Dale, Wade, and Watson of certain individual interests in both the real estate and in the reserved minerals. The suit sought to set aside and annul both the compromise agreement and the mineral lease, and further also the transfers from Marks to Dale, Wade, and Watson.

The defendants moved from summary judgment on the ground of non-joinder of indispensable parties, and absence of jurisdiction if such parties were joined. On submission of the motions, it was established that there were numerous other transferees and assignees of undivided mineral and royalty interests in the property whose joinder and arrayal on either side would defeat the jurisdiction of the court.

---

1 Which we shall hereafter refer to as the compromise agreement.

The plaintiffs, appellants, in their motion for new trial or amendment of judgment in the district court, and in brief here, abandon their efforts to cancel the mineral lease.[2] As to the compromise agreement, however, and the transfers to Dale, Wade, and Watson, they insist that the court can properly render judgment either for or against each of the defendants without directly affecting persons who are not parties to the suit.[3] For reasons to be stated, we agree.

After praying for cancellation of the compromise agreement and of the lease, and the return of the properties,

---

[2] Evidently, because of the holdings in Keegan v. Humble Oil & Refining Co., 5th Cir., 155 F. 2d. 971, and Calcote v. Texas Pacific Coal & Oil Co., 5th Cir., 157 F. 2d. 216.

[3] As explained in more detail in appellants' brief:

"For instance, the Court might, after a hearing render a judgment against the Estate of Marks decreeing the invalidity of the contract, grant and compromise agreement and because of the impossibility of the Estate of Marks being able to re-convey all of the interests which were allegedly taken from the plaintiffs it might render a further judgment against his estate for the value of the interests which he could not re-convey, at the same time deciding in favor of all of the other defendants. On the other hand, the Court might determine that The California Company was a party to the alleged fraud and could render a judgment in favor of the plaintiffs for the value of the minerals extracted from the property. It is also possible that the Court might conclude that The California Company's lease was valid but that since it took a prominent and indisputable part in the alleged fraud that it was liable for attorneys fees and exemplary damages. In like manner, it is possible that the Court might find that The California Company was guilty of fraud and that since it is impossible to cancel the lease without effecting the rights of third persons, not parties to the suit, the Court could order an accounting by The California Company of the value of the minerals which have been extracted from the land. Certainly mineral or royalty owners, not parties to the suit would not be affected by such a judgment are neither necessary or indispensable parties.

"If the defendant Marks, Dale, Watson, Wade and Mrs. Wade cannot return either the fee or the minerals or royalty rights which they received, then certainly a judgment can be framed to return such rights as they still possess and in addition can render a monetary judgment in favor of the plaintiffs for the value of the rights which cannot be returned."

the prayer of the complaint continued, "that in the event that it is impossible for any of the defendants to return the interest which was conveyed to them, your complainants demand the value of the said interest. That in addition thereto that your complainants demand reasonable attorney fees and exemplary damages in the amount of $100,000.00."

Plaintiffs are entitled to any relief which the facts justify even though that relief has not been asked and that theory has not been advanced in the pleadings. This Court had said that before the adoption of the Federal Rules of Civil Procedure [*Young & Vann Supply Co. v. Gulf, F. & A. Ry. Co.* (1925), 5 F.2d. 421, 423; *Edenborn v. Wigton* (1934), 74 F.2d. 374, 376]; and so had the Supreme Court of the United States [*Lockhart v. Leeds*, 195 U.S. 427, 437; *Bemis Bag Co. v. United States*, 289 U.S. 28, 34]. Rule 54(c), F.R.C.P., has expanded that idea measurably:

> "* * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

In brief, appellant argues, and soundly so we think, that:

> "There are two * reasons why the royalty owners are not indispensable parties.
>
> "The first reason is that the rights of the royalty owners would continue to exist irrespective of the outcome of the present suit. The royalty owners who deraign their title from the appellants are protected under their warranty of title,

both express and implied. As to the royalty owners who deraign their title from the appellees suffices to say that no attempt has been made by the appellants to in any way effect their title, but, on the contrary appellants have asked for a money judgment against the defendants for the value of such royalty interests as defendants may not be able to re-convey to appellants.

"The second and more compelling reason why the royalty owners rights might not be effected regardless of the outcome of the suit is that their titles are protected by the Public Registry Act. This Act which was Act No. 7 of the Second Extra-ordinary Session for the year 1950 and which became Louisiana Revised Statute 9:2721-2723 is as follows:

* * * * * * * *

"Since the royalty owners have acquired their various interests on the strength of the public records of which the quitclaim agreement was a part, neither appellants nor appellees could ever be heard to question the titles of these royalty owners. The title of these royalty owners are indefeasible and regardless of what judgment might be rendered in the instant case their title cannot be effected.

"We have concluded that the lease may not be set aside except with the joinder of all of the royalty interests but the cancellation of the quitclaim deed presents an entirely different situation than does the cancellation of the mineral lease. In the cancellation of the mineral lease each of the various royalty owners are effected. As was said in the case of Calcote v. Texas Pacific Coal

& Oil Company, (Fifth Circuit—1946), 157 F. (2d) 216, the cancellation of the present lease would destroy their vested interest in praesenti, whereas a declaration of its invalidity would either destroy absolutely their vested interest in virtuo or postpone the enjoyment of it indefinitely.

"The cancellation of the quitclaim and compromise deed would merely restore to the appellants that which was fradulently taken from them and could not and would not affect in the slightest the rights of any royalty holders who held either from appellants or from appellees."

It was said by this Court in *Seeley v. Cornell*, 74 F.2d. 353, 356: "it is within the powers of a court of equity to deprive a party of the benefit of a deed or judgment obtained by fraud without their being set aside." The power of a court of equity so to mold its decree as to do complete justice between the parties without adversely affecting those not before the court is exceedingly broad and elastic.

We hold that the district court erred in requiring all persons having or claiming any interest in the lands to be made parties, and in dismissing the suit upon plaintiffs' failure to join those whose joinder would have defeated the jurisdiction of the court. Instead, the court should retain jurisdiction and limit any relief granted to such as can be given without prejudice to the absent parties.[4] The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

---

[4] See Hudson, et al. v. Newell, 5th Cir., 172 F. 2d. 848; on rehearing, 174 F. 2d. 546.

HUTCHESON, Chief Judge: I dissent.

HUTCHESON, Chief Judge, dissenting:

The judgment appealed from did not dispose of or even attempt to deal with the merits of plaintiffs' claims against the defendants. Neither did it attempt to place any barrier in the way of plaintiffs suing the defendants in the state court on the claims sought to be asserted in the federal court, nor any in the way of their again suing the defendants in the federal court on any of their claims, except those for the cancellation of instruments on which the rights of others not parties to the suit depended.

What and all that is in question here then is whether, by belatedly offering in this Court what they should have offered to do in the court a quo, to amend their complaint to eliminate such claims for cancellation, they may put the district judge in error and the defendants to the cost of this appeal.

Of the clear opinion that in simple justice to the district judge and to the defendants they cannot do this, I thus set briefly down my reasons for dissenting.

That the plaintiffs had and have the right, without making additional parties, to sue the defendants in the federal court for their fraud and require them to disgorge their alleged ill gotten gains, the district judge did not, and no one could or can, deny. That plaintiffs did not have the right to sue the defendants alone in the federal court for cancellation of instruments on which the rights

of others depend, I had thought, until the opinion of the majority put the district judge in error for following this Court's teachings, settled by the course of decision here culminating in our en banc decision in *Hudson v. Newell*, 172 F.2d. 848, 174 F.2d. 546.

If the plaintiffs had, in response to the motion, offered below to amend their complaint to eliminate their claims for cancellation or to affirm the validity against such claims of the titles and rights which would or might otherwise be affected by such claims, the district judge could not, nor would he have refused them permission to do so.

In my considered opinion plaintiffs cannot, as the majority has held that they can, be belatedly offering in this Court to do so, if this Court will reverse the judgment, which, for default of their offer to amend, was rightly entered, put the district judge in error for doing his duty and the defendants to the cost of this appeal for insisting that the district judge do what he ought to have done.

I would affirm the judgment with costs against appellants without prejudice of course to plaintiffs' right, if they are so advised, to refile against the defendants in the federal court a suit for fraud and an accounting to plaintiffs for their alleged ill gotten gains.

APPENDIX 2.

ORDER OF THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT DENYING APPLICATION FOR REHEARING.

Entered September 28, 1955.

Since neither of the judges who concurred in our original decision is of the opinion that the petition for a rehearing should be granted, the same is denied. Fifth Circuit Rule 29.

DENIED.

"HUTCHESON, Chief Judge, dissenting."

APPENDIX 3.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA.

Rendered—April 14, 1955.

DAWKINS, J.: The complaint was filed December 13, 1951, for the cancellation of a compromise agreement dated June 26, 1940, between certain persons based upon a charge that Henry M. Marks, now deceased, had fraudulently "conspired with certain agents of the California Company to divest claimants of the land and most of the minerals" of certain described properties. The defendants were the estate of said Marks, John Dale, Jr., Philip Watson, Thomas M. Wade, Jr., Mrs. Kate LaCour Wade and The California Company. The prayer of the petition was as follows:

> "Wherefore, your complainants demand to have cancelled and set aside the contract, grant, agreement and act of compromise dated June 27, 1940 which is recorded in Book BB at Page 525 of the records of Tensas Parish, Louisiana and to have restored to them, in their proper proportions, the property described in paragraph 3 of this complaint together with the one half of the minerals thereunder. They demand from Henry M. Marks all royalties which have been paid by The California Company under the lease agreement dated June 26, 1940 recorded in Book BB, page 528 of the records of Tensas Parish, Louisiana, together with legal interests thereon from the date of each payment. They demand of John Dale, Jr. the property and minerals purportedly

conveyed to him under the transfer dated October 15, 1941 recorded in Book JJ, page 655 of the records of Tensas Parish, Louisiana and to have cancelled from the records the said instrument together with all royalties which might have been paid to him and with legal interest thereon from the date of each payment until paid; they demand of Thomas M. Wade, Jr. the property and minerals purportedly conveyed to him under the transfer dated October 15, 1941 recorded in Book MM, page 222 of the records of Tensas Parish, Louisiana, and to have cancelled from the records that said instrument, together with all royalties which might have been paid to him thereunder, with legal interest thereon from the date of each payment until paid. Complainants demand of Phillip Watson the property and minerals purportedly conveyed to him under the transfer dated January 6, 1946 recorded in Book MM, page 165 of the records of Tensas Parish, Louisiana and to have cancelled from the records that said instrument, together with all royalties which might have been paid to him thereunder with legal interest thereon from the date of each payment until paid. Complainants demand of Mrs. Kate LaCour Wade the property transferred under the instrument dated March 11, 1946 recorded in Book MM, page 295, of the records of Tensas Parish, Louisiana and to cancel that said instrument insofar as it affects the property described in this complaint together with any royalties which might have been paid to her on this property and with legal interest thereon from the date of each payment until paid. Complainants demand the cancellation of the oil, gas

and mineral lease dated June 26, 1940 recorded in Book BB, page 529 of the records of Tensas Parish, Louisiana and demand the value of all minerals which have been produced and extracted from the said property, together with legal interest thereon from the date of production, subject only to the actual cost of drilling and of production; that in the event that it is impossible for any of the defendants to return the interest which was conveyed to them, your complainants demand the value of the said interest. That in addition thereto that your complainants demand reasonable attorney fees and exemplary damages in the amount of $100,000.00."

On January 1, 1952, plaintiffs filed an amended complaint making Mrs. Emma Marks, "widow and executrix of the estate of Henry M. Marks, party and praying that all pleadings 'herein' be served on her."

Many other preliminary pleas were filed and considered and thereafter answers and special pleas were filed as follows: On April 24, 1952, by The California Company, April 29th by Philip Watson, answer and special pleas by John Dale, Jr. and on May 29th an answer was filed by the estate of Henry M. Marks by Mrs. Emma M. Marks, executrix.

Further proceedings were had and on March 26, 1953, motions for summary judgment were filed by defendants Wade, Wade, and Dale, on the 27th by California Company and on the 31st by Watson.

On April 3, 1953, a pre-trial hearing was had at which certain stipulations, depositions and documents were filed and by agreement, pleas to the jurisdiction and motions for summary judgment were set down for April 15, 1953. In the meantime supplemental pleas of non joinder and want of jurisdiction were filed by Watson and for summary judgment by Emma M. Marks, administratrix of the estate of Henry M. Marks.

On April 15th by agreement, all motions and pleas were submitted "on documentary evidence to be filed by each side x x x and on briefs to be filed by defendants within 15 days thereafter."

On June 16th the California Company filed another motion to compel joinder of "indispensable parties" and dismiss for lack of jurisdiction and on the 29th of that month the defendant filed a "folder x x x containing exhibits in support of motions to dismiss for non joinder of indispensable parties and want of jurisdiction."

July 1, 1953, defendants' brief was filed with the Clerk. Plaintiffs had failed to file a brief and early in March, 1954, the court directed the clerk to advise their counsel that such briefs should be filed in ten days and that the record, at the end of that time should be sent to the Judge. The record was mailed to the court on March 24th following. Plaintiffs have not as yet filed any brief.

In the original complaint, the plaintiffs, Mackintosh and his wife; Dora Bryant James, widow of Guy R.

James; Bryant James; Edward C. James and Mrs. Emily Lee Graham were alleged to be citizens of Texas, and Mrs. Amanda Graham Smith, Mrs. Nanie Sadler Graham, Henry E. Graham and Rolla E. Graham were alleged to be citizens of Missouri. The complaint also alleged that defendant Henry M. Marks, deceased, his widow, Emma Moses Marks were citizens of Mississippi; and that John Dale, Jr., Philip Watson and Mrs. Kate LaCour Wade were citizens of Louisiana; that Thomas M. Wade, Jr., was a citizen of Colorado and The California Company was a citizen of California. The amount necessary to give jurisdiction to this court was also alleged.

Taking up the answer and pleas therein contained of Thomas M. Wade, Jr., which is typical of all, it is not disputed that the land and mineral interest involved were situated in the Parish of Tensas in this District. The cause of action is one to annul a compromise agreement alleged to have been entered into on June 26, 1940, and a mineral lease executed at the same time by Guy R. James, Dora B. James, R. D. Mackintosh, Mrs. Alice Mackintosh, Emily Lee Graham, Charles L. Graham and Amanda G. Smith and Henry M. Marks, citizens of the states as recited above. In the compromise agreement the parties named declared that it was their purpose and that they did thereby convey "as a quitclaim without warranty x x x except as to their own acts and deeds, certain tracts of land in Tensas Parish" to an unnamed vendee. However, the document recites that "in consideration of said conveyance to the vendee x x x does by this act sell x x x and quitclaim, without warranty x x x except as to their own acts x x x with full subrogation

and substitution x x x unto the vendors in the proportion hereinafter set out, their heirs and assigns all his right, title, interest and claim to x x x their undivided one-half interest of all oil, gas and other minerals in, under and that may be produced from hereinabove described land and mineral rights x x x."

Other stipulations unnecessary to mention were included in the compromise agreement and it ended with the following declarations:

"The true intent and purpose of this act is that by this instrument of contract, grant, and act of compromise the vendee, insofar as the vendors are concerned, is recognized and declared to be the owner of the fee simple title to the above described land, subject to the ownership by the vendors of an undivided one-half of the oil, gas and other minerals in, under and that may be produced from said land as hereinabove provided.

"*All the agreements and stipulations herein contained shall inure to the benefit of and be binding upon the heirs, successors and assigns of the parties hereto.*" (Emphasis by the writer.)

This agreement was signed by the parties above named on various dates, apparently as the document reached them, and by Henry M. Marks, "vendee" on the 26th of July, 1940.

On the same day a mineral lease was executed by the named vendees and thereafter interests in minerals and

royalties were conveyed to numerous persons, including citizens of Texas, Mississippi and Missouri as shown in the motion of The California Company, which is similar in all material respects to that of Wade, to wit:

Harold A. Burt
309 South Crestway
Wichita, Kansas

Wilton R. Dale
Vidalia, Louisiana

Mrs. Nan M. Hairs
c/o Ernest Mackintosh, Auditor
Suite 421 Reliance Building
Kansas City, *Missouri*

T. E. Mackintosh
423 Reliance Building
Kansas City, *Missouri*

Sue Dale Newton
Vidalia, Louisiana

Dorothy Dale Reeves
Vidalia, Louisiana

L. L. Sugar
1033 Giddens Lane Building
Shreveport, Louisiana

Renza Dale Schiele
c/o L. D. Dale
Vidalia, Louisiana

Joseph Stein
P. O. Box 277
Jay's
Greenville, *Mississippi*

John Dale III
Vidalia, Louisiana

Ralph A. Johnston
1423 Esperson Building
Houston, *Texas*

Estate of E. A. Showers
523 City National Bank Bldg.
Houston, *Texas*

Mrs. Elizabeth Showers
523 City National Bank Bldg.
Houston 2, *Texas*

I. F. Betts
c/o The American National Bank of Beaumont
Beaumont, *Texas*

Alma Dale Campbell
Vidalia, Louisiana

J. Balfour Miller
Natchez, *Mississippi*

L. D. Dale
Vidalia, Louisiana

Camille Rogers Martin
Vidalia, Louisiana

Nemours Corporation
1090 Dupont Building
Wilmington, Delaware

John Dale, Jr. and L. D. Dale
Trustees for Susie Camille Rogers
Vidalia, Louisiana

Sabine Royalty Corporation
603 Southland Life Building
Dallas 1, *Texas*

H. C. Skidmore
P. O. Box 188
Shreveport, Louisiana

Guy A. Thompson, Trustee
Missouri Pacific R.R. Co., Debtor
Missouri Pacific Building
St. Louis 3, *Missouri*

E. P. Wingfield
6626 Del Norte Lane
Dallas, *Texas*

Mrs. Owen W. Wade
720 South Garfield Street
Denver 9, Colorado

William G. Johnston
2409 First National Building
Oklahoma City, Oklahoma

Documentary evidence was submitted to establish these transfers.

If these parties are brought in, their claims would be based on the same compromise agreement and lease, since they acquired from either the vendor or vendees, lessors of lessees. If those from Mississippi, Missouri and

Texas chose to join the plaintiffs, the result would be that an annulment of the two contracts would have the effect of carrying with it the destruction of their interests. On the other hand, if they decided to defend and resist the plaintiffs' demands, they would have to be arrayed as defendants, with the result that as to some ten or eleven, the action would necessarily be between citizens of these same states, which, of course, would deprive this court of jurisdiction. Jurisdiction rests solely upon diversity and all plaintiffs must be citizens of states other than those of all defendants.

My conclusion is that the persons named, are indispensable parties, for the reason that their interests would be vitally affected by a judgment annulling the compromise and lease which plaintiffs demand.

See Rule 23 of Civil Procedure, *Calcote v. Texas Pacific Coal & Oil Co.*, 157 F.2d 216, Cert. denied 329 U.S. 782; *Kentucky Natural Gas Corporation v. Duggins*, 165 F.2nd 1011; *Warfield v. Marks*, (5th Cir.) 190 F.2d. 178, Cert. denied 342 U.S. 887.

The complainants will, therefore, be required to make all persons having or claiming any interest in the lands, mineral leases or royalties in the property involved parties to this suit within a period of twenty days, and in default thereof, the case will stand dismissed.

DONE AND SIGNED IN Chambers in New Orleans, Louisiana, this 14th day of April, 1954.

(Sgd.) BEN C. DAWKINS,
Judge.

Filed, April 15, 1954,
Alton L. Curtis, Clerk.

APPENDIX 4.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION.

CIVIL ACTION No. 3559.

R. D. MACKINTOSH, ET AL.,

versus

ESTATE OF HENRY M. MARKS, ET AL.

ORDER.

On April 14, 1954, this Court entered an order that "The complainants will, therefore, be required to make all persons having or claiming any interest in the lands, mineral leases or royalties in the property involved parties to this suit within a period of twenty days, and in default thereof, the case will stand dismissed."

Thereafter on April 23rd plaintiffs filed a motion for re-hearing, but nothing further has been done to prosecute the same.

Counsel for defendants have attempted repeatedly to have this motion heard under dates of May 5, 1954, May

17, 1954, and September 21, 1954. In the last communication plaintiffs' counsel were informed that unless some action was taken defendants would ask the Court to set the matter down for hearing at a fixed time and in default of response that the Court dismiss it. Not having received an acknowledgement or reply to any of these communications, on October 4th Counsel for defendants, having written the letter of September 21st at the Court's suggestion, addressed a communication to Ben C. Dawkins, Sr., Retired District Judgue for the Western District of Louisiana but who retained jurisdiction of this case along with others, recapitulating all of this correspondence and efforts to get the motion submitted, sending copy of said letter of October 4th, 1954, to opposing counsel. He has now asked the Court to fix a time within which plaintiff should be required to take action and in default of which the case be dismissed as provided in the original order which the motion sought to have set aside.

The plaintiffs are accordingly ordered to submit this motion on brief not later than October 20th, and, in default thereof, it will stand dismissed as directed in the original order.

DONE AND SIGNED IN Chambers in Monroe, Louisiana, this 9th day of October, 1954.

(Sgd.) BEN C. DAWKINS,
Judge.

Filed, October 12, 1954,
Alton L. Curtis, Clerk.

APPENDIX 5.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION.

CIVIL ACTION No. 3559.

R. D. MACKINTOSH, ET AL.,

versus

ESTATE OF HENRY M. MARKS, ET AL.

ORDER.

In the above numbered and entitled cause, this Court, on October 9, 1954, directed plaintiffs to submit the motion for new trial on brief not later than October 20, 1954.

No such submission having been made within delay allowed, the motion for new trial is denied.

DONE AND SIGNED IN Chambers in Monroe, Louisiana, this 21st day of October, 1954.

(Sgd.) BEN C. DAWKINS,
Judge.

Filed, October 22, 1954,
Alton L. Curtis, Clerk.

APPENDIX 6.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION.

CIVIL ACTION No. 3559.

R. D. MACKINTOSH, ET AL.,

versus

ESTATE OF HENRY M. MARKS, ET AL.

DECREE.

This cause having been filed, served and put at issue, and having been submitted to the Court on defendant's motions for summary judgment asserting certain exceptions therein specified, including the prayer of defendants that the action of the plaintiffs be dismissed for failure to join indispensable parties defendant, and the Court having considered the law and the evidence submitted in support of the motions, and having determined same to be in favor of the defendants and against the plaintiffs:

(1) For written reasons assigned in this Court's opinion of April 14, 1954 (filed April 15, 1954), the Court ordered the plaintiffs "to make all persons having or claiming any interest in the lands, mineral leases, or royalties in the property involved parties to this suit within a period of twenty (20) days, and in default thereof, the case will stand dismissed:" an order with which plaintiffs have failed to comply; and:

(2) Plaintiffs having herein filed a motion for new trial, this Court for reasons assigned in order of October 9, 1954 (filed October 12, 1954), directing plaintiffs "to submit this motion on brief not later than October 20th, and, in default thereof, it will stand dismissed as directed in the original order;" an order with which plaintiffs failed to comply; and:

(3) By order of October 21, 1954 plaintiffs' motion for new trial having been denied:

Now, therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of all of the defendants, and especially Estate of Henry M. Marks, John Dale, Jr., Philip Watson, Thomas M. Wade, Jr., Mrs. Kate LaCour Wade, and The California Company, and against all of the plaintiffs, and especially R. D. Mackintosh, Mrs. Alice Carmichael Mackintosh, Mrs. Dora Bryant James, Bryant James, Edward C. James, Emily Lee Graham, Mrs. Amanda Graham Smith, Mrs. Nannie Sadler Graham, Henry E. Graham, and Rolla E. Graham, dismissing the suit and action of

the plaintiffs; same to stand dismissed at the cost of plaintiffs.

Decree rendered and signed at Monroe, Louisiana, this 9th day of November, 1954.

(Sgd.) BEN C. DAWKINS,
Judge.

Filed, November 10, 1954,
Alton L. Curtis, Clerk.

DEC 15 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

No. 527

ESTATE OF HENRY M. MARKS, ET AL.,
Petitioners,

versus

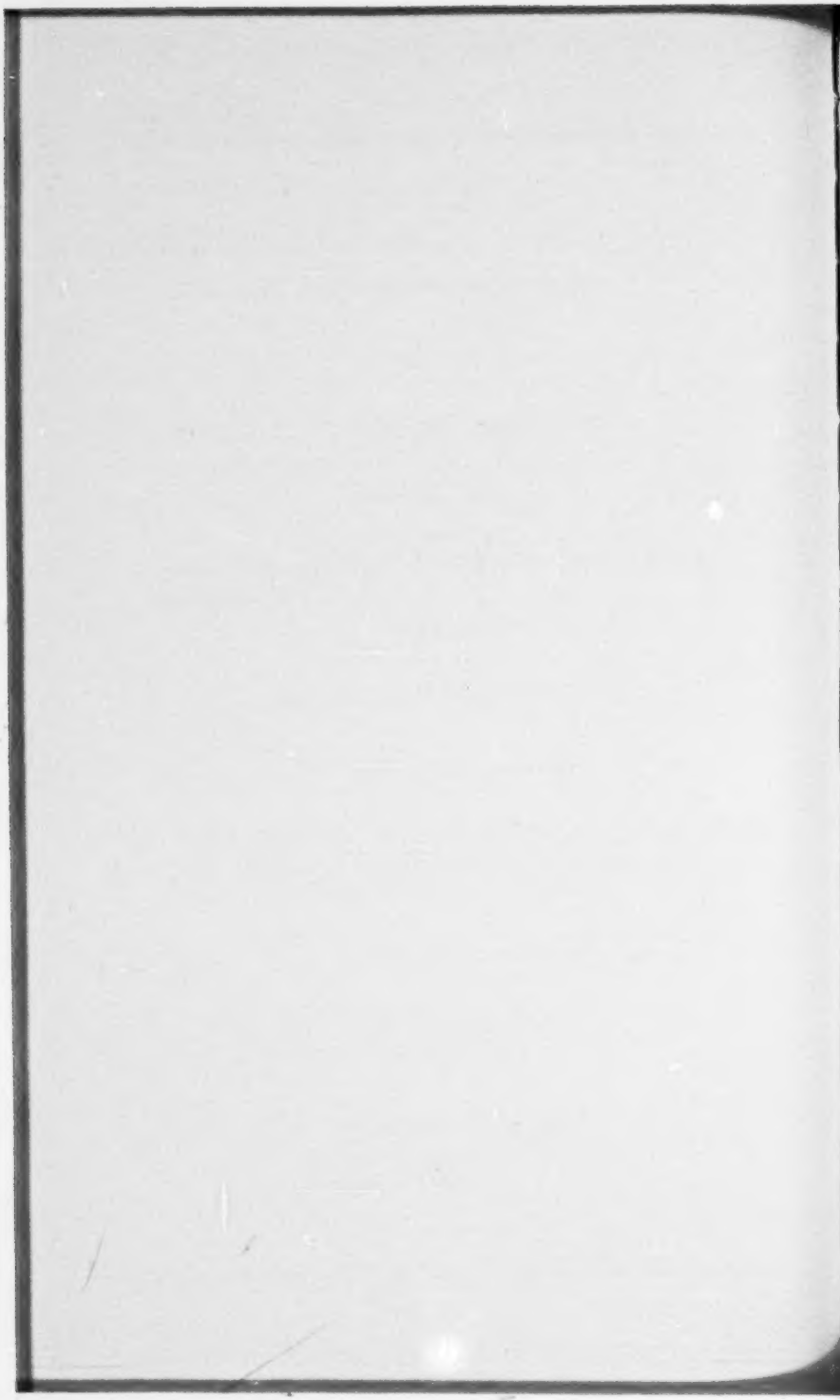
R. D. MACKINTOSH, ET AL.,
Respondents.

BRIEF OF R. D. MACKINTOSH, ET AL, RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SAMUEL J. TENNANT, JR.,
525 Whitney Building,
New Orleans, Louisiana.

DHU THOMPSON,
Bernhardt Building,
Monroe, Louisiana.

HAUSER PRINTING CO., INC., NEW ORLEANS



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Supreme Court of the United States

OCTOBER TERM, 1955

No. 527

ESTATE OF HENRY M. MARKS, ET AL.,
Petitioners,

versus

R. D. MACKINTOSH, ET AL.,
Respondents.

BRIEF OF R. D. MACKINTOSH, ET AL, RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

Since the petition for a writ of certiorari filed in this matter fails to make clear the entire factual situation in connection with this litigation we are including in this brief a more or less detailed statement of the facts as alleged in the complaint.

THE FACTS AS ALLEGED IN THE COMPLAINT

Certain residents of the State of Texas and of the State of Missouri, as plaintiffs, brought suit against certain residents of the States of Mississippi, Louisiana, Colorado and a corporation incorporated under the laws of the State of California. The jurisdiction of the Federal Court is founded on a diversity of citizenship. The

requisite monetary amount was alleged.

The plaintiffs were either the owners or the heirs of owners of certain real estate situated within the jurisdiction of the United States District Court for the Western District of Louisiana.

The complaint alleges that Henry M. Marks, deceased, whose executor is a defendant, acting in consort with certain agents and employees of the defendant, The California Company, devised a scheme to defraud the "owners" of certain land situated in Tensas Parish, Louisiana, and of most of the minerals thereunder. That the scheme contemplated that agents and employees of The California Company would represent to the "owners" that the "owners" title to their property was fatally defective and that Marks had a superior title to the property, but that if the "owners" of the property would convey the property to Marks he would re-convey to them a one-half interest in the minerals thereunder and that The California Company would thereafter take a joint oil, gas and mineral lease from both the "owners" and from Marks.

It is alleged that at the time the scheme to defraud was confected and subsequently, when it was carried into execution, both Marks and The California Company well knew that Marks had no title whatever to the property nor was he in possession thereof, and that there would therefore be no consideration for the transfer to Marks. That as a part of the scheme it was contemplated that by using an employee and representative of The California Company, a major oil company, the "owners" would be lulled into a belief that the statements made to them were true and would thus induce the "owners" to

sign the compromise agreement transferring the property to Marks without any investigation. That by this means The California Company would secure the oil, gas and mineral lease which they desired.

That thus relying upon the representations made to them by the representatives of The California Company the "owners" signed a contract, grant, compromise agreement and also signed an oil, gas and mineral lease. That the contract, grant and compromise agreement, as well as the oil, gas and mineral lease, were prepared under the directions of the defendant, John Dale, Jr., who was acting as the attorney for both the defendant, Marks, and the defendant, The California Company. That thereafter Marks made transfers to John Dale, Jr., Thomas M. Wade, Jr. and Philip Watson, all attorneys, of certain undivided interests, both in the real estate and in the minerals, the consideration for the transfer being legal services in connection with securing the title to the real estate. Later, the defendant, Thomas M. Wade, Jr., transferred a portion of his interest in both the lands and the minerals to the defendant, Mrs. Kate Lacour Wade, as a settlement of Mrs. Wade's rights in community after their divorce.

The suit seeks to set aside and annul:

1. The contract, grant and compromise agreement dated June 26, 1940 between the "owners" and Henry M. Marks, and
2. The oil, gas and mineral lease in favor of The California Company signed by both the "owners" and by Marks.

These two documents are entirely separate and distinct instruments, the compromise agreement being re-

corded in Book BB, page 525 of the records of Tensas Parish, Louisiana, and the mineral lease being recorded in Book BB, page 529 of the records of Tensas Parish, Louisiana. These two documents are the underlying or basic instruments which were sought to be cancelled. However, in addition to the cancellation of these documents plaintiffs also seek to set aside:

3. Transfer from Henry Marks to John Dale, Jr. of certain interests in the fee and in the minerals;

4. Transfer from Henry Marks to Thomas M. Wade, Jr. of certain interests in the fee and in the minerals;

5. Transfer from Henry Marks to Philip Watson of certain interests in the fee and in the minerals; and

6. Transfer from Thomas M. Wade, Jr. to Mrs. Kate Lacour Wade of certain interests in the fee and in the minerals.

IN ADDITION to the cancellation of the six instruments recited above the prayer of the complaint asked for judgment for the amount of all royalties which had been paid to Henry M. Marks, or to his estate; for the amount of all royalties paid to John Dale, Jr.; for the amount of all royalties paid to Thomas M. Wade, Jr.; for the amount of all royalties paid to Philip Watson and for the amount of all royalties paid to Mrs. Kate Lacour Wade. The complaint also demanded judgment against The California Company for the value of all minerals which had been produced and extracted from the property, subject to the costs of drilling and production. The prayer of the complaint further demanded that in the event that it was impossible for any of the defendants

to return the interest which had been conveyed to them that a monetary judgment be rendered against the defendants for the valuee of the interest which they were unable to re-convey. Finally plaintiffs seek a judgment against all of the defendants for reasonable attorneys fees and exemplary damages in the amount of $100,000.00.

THE DEFENSE

The various defendants filed motions for a more definite statement and after these motions were overruled, filed answers.

It is important from a factual standpoint to note that despite the allegation of the complaint (paragraph 11—Transcript page 6) "that Henry M. Marks had no title whatever to the said property nor was he in possession thereof;" none of the defendants in their answers have set up either title or possession in Marks as a basis of consideration for the compromise agreement.

After the taking of the testimony of many witnesses, the defendants filed motion for summary judgments and motion to compel the joinder of indispensable parties and to dismiss for lack of jurisdiction. In connection therewith and in support of these motions the defendants filed exhibits which consisted of mineral assignments made by both plaintiffs and defendants to third parties who were residents of various states, including but not limited to Texas, Mississippi and Missouri.

The defendants contended that the assignees of these mineral interests were "indispensable parties" and that since some of the assignees were residents of the same states as were the plaintiffs while others were residents

of the state of one of the defendants, that there was a failure of diversity and the District Court had no jurisdiction.

On April 14, 1954 the District Court in passing upon the motion for summary judgment and motion to compel joinder of indispensable parties and dismiss for lack of jurisdiction entered the following order:

> "The complainants will, therefore, be required to make all of the persons having or claiming any interest in the lands, mineral leases or royalties in the property involved, parties to this suit within a period of twenty days and in default thereof the case will stand dismissed."

Plaintiffs thereafter filed a motion for a new trial and/or amendment of judgment, the motion for a new trial having been denied, and the plaintiffs refusing to join the additional parties a decree was entered dismissing plaintiffs' suit. From this dismissal plaintiffs prosecuted an appeal to the United States Court of Appeals for the Fifth Circuit.

THE APPEAL

The plaintiffs perfected their appeal to the United States Court of Appeals for the Fifth Circuit and the specification of errors relied on in that Court were as follows:

> "(a) The Court erred in its order of April 14, 1954 in which it required the plaintiffs to make all persons having or claiming any interest in the lands, mineral leases or royalties in the property involved, parties to this suit, since to do so would have resulted in destroying the diversity of citizenship requisite for the jurisdiction of this Court;

(b) The Court erred in not limiting its order to the claim for the cancellation of the oil, gas and mineral lease since this claim alone was the only one of several against which the motion to compel the joining of indispensable parties could properly be urged;

(c) The Court erred in not dismissing plaintiffs' claim for a cancellation of the oil, gas and mineral lease and allowing plaintiffs to proceed to trial on the various other claims against all of the named defendants."

After a hearing the Court of Appeals for the Fifth Circuit rendered a decree on August 26, 1955, which decree reversed the District Court and remanded the case to the District Court with instructions "to retain jurisdiction and limit any relief granted to such as can be given without prejudice to the absent parties". Appellees then filed a petition for a rehearing which rehearing was denied on September 28, 1955. After the mandate had been sent to the District Court appellees secured an order recalling and staying the mandate for a period of thirty days so that they might apply for writs of certiorari to this Court.

QUESTIONS PRESENTED ON THE PETITION FOR WRIT OF CERTIORARI

The petitioners have stated that there were four questions raised in their petition for writs of certiorari and for the convenience of the Court we are copying these questions in this brief and will attempt to answer each one. The questions are:

"(1) Whether in a suit to cancel for fraud a deed and a mineral lease, successors in interest of the parties to that deed and lease are indispensable parties where the complainants have

also prayed for monetary relief.

(2) Whether the judgment of the Court of Appeals denies to Petitioners due process of law, in contravention of the Fifth Amendment to the Constitution of the United States of America by denying to Petitioners the protection of the procedural rule of indispensable parties, and by permitting respondents to remain in court by belatedly seeking to amend the gravamen of their complaint for the first time in the Court of Appeals on their appeal from a judgment of dismissal rendered by the District Court.

(3) Whether Rule 54(c) of the Federal Rules of Civil Procedure, 28 U.S.C. warrants the judgment rendered by the Court of Appeals.

(4) Whether the construction placed upon the public registry laws of the State of Louisiana by the Court of Appeals for the Fifth Circuit requires that those laws be declared unconstitutional as violative of the prohibition against impairment of the obligations of contract contained in Article I, Section 10 of the Constitution of the United States of America."

CAN THE COURT RENDER A JUDGMENT FOR MONETARY RELIEF AGAINST THE NAMED DEFENDANTS WITHOUT THE JOINDER OF ADDITIONAL PARTIES

While the petitioners in their petition (Page 3) have stated that the questions presented were:

> "Whether in a suit to cancel for fraud a deed and a mineral lease, successors in interest of the parties to that deed and lease are indispensable parties where the complainants have also prayed for monetary relief"

they have failed to discuss this question. Under Rule

8-E (2)[1] and Rule 18-A[2] of the Federal Rules of Civil Procedure it is provided that separate claims against multiple parties can be joined in one complaint, the restriction in Rule 20[3] being that they must arise out of the same transaction, occurrence or series of transactions or occurrences. It was therefore proper under the alleged facts to join all of the various named defendants and to seek the several **reliefs** demanded in the complaint.

As we understand the law, the Court will not dismiss a suit if there is any claim properly pleaded upon which affirmative relief can be granted.

In *Hudson, et al v. Newell, et al*, 172 F. (2d) 848 (CCA 5th Cir) the Court said:

> "We are of the opinion that Federal jurisdiction exists in each of the four suits as they are brought, complete diversity existing and the principal amount involved being sufficiently alleged to be more than $3,000.00 **THE RELIEF**

[1] Rule 8-E (2) Federal Rules of Civil Procedure: " . . . A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11."

[2] Rule 18-A Federal Rules of Civil Procedure: "Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or also alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied."

[3] Rule 20-A Federal Rules of Civil Procedure: "Permissive Joinder: All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

PRAYED IN MULTIFORM. The original complaint asked a decree that the plaintiffs are the true owners of the land and of the mineral rights therein and of the oil and gas removed from it by the defendant oil company. If they can prove the land and oil are theirs we see no reason why they should not have judgment for them against those sued; possible claimants not in Court would not, of course, be bound by the result. If such claimants' title is shown as a defense their interests can be saved from the decree. But the next prayer that all of the adverse deeds be cancelled cannot be granted if there are any persons interested under them who are not before the Court. The prayer that the oil company discover what oil they have taken out can be granted if the plaintiffs prove they have some interest in it, though not the whole interest.

"* * * WE THEREFORE HOLD THAT WHILE THE FULL RELIEF PRAYED CANNOT BE GIVEN WITH ONLY THE PARTIES BEFORE THE COURT A LIMITED RELIEF CAN BE, AND THE SUIT SHOULD BE RETAINED TO ENQUIRE INTO IT." (Emphasis ours)

If various claims are joined in a complaint and the Court finds that it may not grant relief on every claim it may render appropriate orders dismissing those claims upon which no relief may be granted and proceed to a determination of those upon which it may properly grant relief.

This then poses the question, can the Court render a judgment on any of the demands prayed for in the original complaint in the instant case without joining additional parties.

It seems to the writers of this brief that it is Horn-

book law that a Federal Court has jurisdiction, to adjudicate a controversy, there being the proper diversity and monetary requisites present, and the facts being:

> A sues B for the fraudulent conversion, through the use of the "confidence game", for the return of A's one hundred shares of United States Steel stock and the dividends collected, or, alternately in the event that B cannot return the stock, for the value of the stock and for such dividends as B may have received thereon.

Can it be said that because B has alienated fifty shares of the stock to C, that C is a necessary party and that A cannot secure a judgment against B for those shares still remaining in B's name and for the value of the stock which B cannot return.

We believe that the above example poses an exact parallel to the instant case. In the instant case we have not sought, in any way, to effect the assignments made by Marks except those made to this attorneys who had full knowledge of the fact that Marks had neither title to nor possession of the property and which knowledge was amply demonstrated by the Exhibits, filed in the Circuit Court of Appeals in the original, but which Exhibits were not filed in connection with the petition for writs of certiorari. As to the fraudulent intent of the defendants Marks and Wade a quotation from a letter from Marks to Wade under date of January 30, 1940 (Plaintiff Exhibit—Wade 13) is most explanatory.

> "I explained to Homer Thompson, the oil company's (California) representative that **I actually had no valid title.**" (Explanation and emphasis ours)

And in reply thereto a letter from the defendant

Wade to the defendant Marks under date of February 2, 1940 as follows:

> "I am sure that you understand that I was somewhat at a loss to know just how to talk to Mr. Thompson for the reason that I did not want to explain the full details concerning your claim to the land and so I had to be rather vague in what I said. As a matter of fact **you have no title whatever** to the land at this time and any lease they might take from you would not hold water. However if by giving them a lease it would prevent them from attempting to get in touch with the **real owners** of the property, then it might be best for you to do so under the circumstances." (Plaintiffs Exhibit—Wade 14) (Emphasis ours)

We have pointed out the above evidence and have called the Court's attention to the failure of the defendants to assert title in Marks, for the reason that the defendants, both in their brief in the Court of Appeals, and in their petition to this Court, have suggested that the decision in the instant case could effect, in some undisclosed way, the title of one of the mineral owners. NOTHING COULD BE FURTHER FROM THE TRUE FACTS. If the plaintiffs are successful, then those who have deraigned their title from the plaintiffs are fully protected by both the express and implied warranty of their purchase. As to those who deraign their title from the defendants, suffices to say that no attempt is made to affect these titles; no relief of any kind is asked against any mineral owners, except those named in the complaint, and the plaintiffs would be estopped to question these titles for the reason that they have asked for a monetary judgment against the named defendants for the **value** of those mineral interests which cannot be returned by the named defendants. If, on the other hand, the defendants are successful in this suit, the mineral

grantees are again fully protected under the express and implied waranty of their purchase. The attempt of the defendants to intimate, that because the defendants in their "scheme" hit upon the use of the word "compromise", that Marks had any claim whatsoever to the property is belied by the facts, pleadings and exhibits. In our brief in the Appellate Court we challenged the appellees either in reply brief or at the time of argument to affirmatively declare whether Mr. Marks had any title. This challenge went unheeded. We believe that under the various demands for judgment contained in the complaint that a District Court can render a proper judgment without affecting in any way the rights of absent parties. Later in this brief we will further demonstrate to the Court that the rights of the mineral grantees may not be affected because of the Public Registry laws of the State of Louisiana.

HAVE THE PLAINTIFFS AMENDED THE GRAVAMEN OF THEIR COMPLAINT

Relators have raised the question of the denial of due process of law in contravention of the Fifth Amendment of the Constitution of the United States. Undoubtedly with the hope that the raising of some Constitutional question might impress this Court they argue to the Court that there has been a denial of due process because the Court of Appeals permitted respondents to amend the complaint in brief before that Court.

We submit to the Court that nothing could be further from the facts. We did not ask the Appellate Court for any relief which was not demanded in the original complaint. Actually we have abandoned a portion of our demand in the original complaint, i.e., the cancellation of the mineral lease. However, this abandonment took

place in the District Court. Since that portion of the motion for a new trial and/or amendment of judgment which is re-produced in relator's petition (Page 26) leaves out what we consider pertinent portions we reproduce the motion in full as it is found in the Transcript (R 306).

"MOTION FOR A NEW TRIAL AND/OR AMENDMENT OF JUDGMENT

Plaintiffs,

R. D. Mackintosh
Mrs. Alice Carmichael Mackintosh,
Mrs. Dora Bryant James,
Bryant James
Edward C. James
Emily Lee Graham
Mrs. Amanda Graham Smith
Mrs. Nannie Sadler Graham
Henry E. Graham, and
Rolla E. Graham

move for a new trial and/or for the amendment of the judgment herein rendered for the following reasons and on the following grounds:

1.

That the judgment rendered herein in Chambers in New Orleans dated April 14, 1954 is contrary to the law.

2.

That under the Complaint as is shown in the opinion that plaintiffs sought to set aside and annul:

(a) A compromise agreement dated June 26, 1940 in favor of Henry M. Marks, and

(b) A mineral lease in favor of The California Company.

These being separate and distinct documents.

Plaintiffs also sought to set aside certain transfers of royalty interests and interests in fee simple made by Henry M. Marks to his alleged co-conspirators, and

(c) They sought to recover from The California Company the value of such minerals as The California Company may have withdrawn from the land.

That these various claims were separable and the Court might, after a hearing, have found for the plaintiffs on one, two or all three of the separable claims. That since the claims against the other defendants, except The California Company, do not involve the setting aside of the mineral lease to give them validity, and since there is a claim for a money judgment against The California Company the decree of this Court, which is based entirely upon the proposition that a mineral lease cannot be set aside without making all of the people affected by it parties to the suit is not pertinent to the claims for the return of plaintiffs' property, for the mineral interests thereunder and for reimbursement or accounting to the plaintiffs of the value of the royalties paid, nor is it applicable to the claim for an accounting against The California Company for the minerals which they have withdrawn from the land.

3.

That the decree ordering complainants to make all persons having, or claiming any interest in the lands, mineral lease, or royalties in the property involved, parties to this suit within twenty days, or in default thereof the case will stand dismissed, is too broad and amounts to a dismissal of plaintiffs' complaint on separable claims against which no plea to the jurisdiction of the Court can properly lie.

4.

That the Court was manifestly in error in

> ordering a complete dismissal of the case against any of the named defendants for the reason that as against all of the named defendants allegations upon which proper relief could be given were made which would not involve the non-joinder of indispensable parties and/or want of jurisdiction."

If this motion did not amount to an abandonment of the attack upon the mineral lease, as the Circuit Court of Appeals decided that it did, the motion was certainly sufficient to suggest to the District Court, the error which it had committed in not amending its order of April 14, 1954 so as to protect relator's rights under the various other demands contained in the original complaint.

Frankly, we cannot follow the reasoning behind relator's position that there has been a denial of due process and we cannot understand how the cited case of *Ackerman v. United States*, 178 F. (2d) 983 affirmed 340 U.S. 193, 71 S. Ct. 209, 1950 is at all in point. After quoting this case, respondents continue by saying "to permit such amendment here is to excuse neglect." This statement is certainly not pertinent for we have neither sought to amend our complaint nor have we claimed any "excusable neglect". On the contrary, our position is that within the four corners of the original complaint, demands, properly pleaded, and upon which relief could be granted were set up in detail. Even Judge Hutcheson, in his dissent, stated:

> "That the plaintiffs had and have the right, **without making additional parties,** to sue the defendants in Federal Court for their fraud and requiring them to disgorge their alleged ill-gotten gains, the District Court did not and no one could or can deny". (Emphasis ours)

He continued:

> "If the plaintiffs had, in response to the motion, offered below to amend their complaint to eliminate their claims for cancellation or to affirm the validity against such claims of the titles and rights which would or otherwise might be affected by such claims, the district judge could not, nor would he have refused them permission to do so."

It was therefore Judge Hutcheson's view that it was encumbrant upon the plaintiffs in the District Court, either to amend their complaint by striking out the claim for cancellation, or to affirm the validity of the titles and rights of the various mineral grantees. Such a view is in conflict with the holding in *Seeley v. Cornell*, 74 F. (2d) 353 (CCA 5th Cir.) in which it was stated:

> "The plaintiffs sue for an accounting from their agents and representatives; for a decree for the sums of money due and owing to them by the defendants; for a decree vesting title in them of two-ninths interest in the land described in the bill, or at least the joint possession of same to the extent of two-ninths interest; that the defendant be decreed to be the trustees of the land for their use and benefit and account to them for their two-ninths interest in the proceeds of the said land; and for general and equitable relief.
>
> " * * * It is apparent that the other heirs have no interest in the two-ninths separate share of the plaintiffs in their mother's estate and could not be affected by an accounting by Cornell and it is alleged to be his co-conspirators or by a recovery against them merely as to that interest. To that extent they are not indispensable parties.
>
> "Whether the plaintiffs may maintain the case they allege against Colquitt for an accounting as receiver present more difficulty. We entertain

> no doubt that Colquitt, occupying a fiduciary relation to Mrs. Smith, and after her death to all her heirs, and he has not objected to the jurisdiction of the Court in any way. On the contrary, it appears from the record that he has filed an answer admitting many of the material allegations of the bill. However, this presents but a minor cause of action, not affecting the bill as a whole, and should it later appear that plaintiffs may not sue him as receiver, under the other prayers for specific relief and the prayer for general relief, the Court could proceed to judgment on the other allegations of the bill. *Waterman v. Canal-Lovisiana Bank*, 215 U.S. 33, 30 S. Ct. 10, 54 L. Ed. 80, *Lockhart v. Leeds*, 195 U.S. 427, 25 S. Ct. 76, 49 L. Ed. 263."

We submit that the complaint has set forth separate claims and separate causes of action against each of the named defendants upon which affirmative relief can be granted without doing violence to the rights of any third parties.

And in *Hudson, et al v. Newell, et al*, 172 F. (2d) 848 CCA 5th Cir.) the Court held:

> " * * * We therefore hold that while the full relief prayed cannot be given with only the parties before the Court a limited relief can be, and the suit should be retained to enquire into it."

DOES RULE 54-C FEDERAL RULES OF CIVIL PROCEDURE WARRANT THE JUDGMENT

Rule 54-C of the Federal Rules of Civil Procedure provides:

> "Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a

> judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Even before the adoption of the Federal Rules of Civil Procedure this Court in *Lockhart v. Leeds*, 195 U.S. 427-436, 49 L. Ed. 263-269 stated:

> "There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer, to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief, and upon a somewhat different theory from that which is advanced under one of the special prayers."

Again reverting to *Seeley v. Cornell*, 74 F. (2d) 353-356 it is stated:

> "It is within the powers of a Court of equity to deprive a party of the benefit of a deed or judgment obtained by fraud without their being set aside."

This being so, may not the District Court order the defendants to return to plaintiffs whatever property they still hold under the compromise agreement, without setting aside and cancelling the compromise agreement itself and render a monetary judgment for that portion which cannot be returned?

Such a judgment could certainly be rendered on the pleaded facts and the demands for relief.

THE PUBLIC REGISTRY LAW OF THE STATE OF LOUISIANA

Relator's petition on this point is concerned with only the effect of the Registry Laws of the State of Louisiana as they apply to mineral **leases.** As we have previously stated we have conceded that the mineral lease to The California Company cannot be cancelled in this proceeding. However, regardless of whether the compromise agreement is cancelled, the mineral lease would still be in force and effect. The lease itself was signed by both the plaintiffs and by Marks and if the compromise agreement was set aside the lease would still be binding, in its entirety, upon the plaintiffs and upon all mineral grantees, for it is provided in the lease (Tr. pg. 28):

> "If the interest of the lessor covered hereby is stated to be less than the entire fee or mineral estate, this lease nevertheless covers all of the interest actually owned by lessor."

We have no quarrel with the decision in *Arnold v. Sun Oil Co.*, 218 La. 50, 48 So. (2) 369 quoted in relator's petition. However, it is not apropos of the present situation. The *Arnold* case was concerned with a mineral **lease.** In the instant case we are concerned with mineral **sales.** That there is a grave distinction has always been recognized by the Louisiana Courts. In *Gulf Refining Co. of Louisiana v. Glassell*, 180 La. 190, 170 So. 846, 849 the Court said:

> "Oil and gas are fugitive minerals, and the owners of the lands which contain such deposits are not the owners of the oil and gas until they reduce these fugitive minerals to actual possession. The owners of land have a real right in their property to go upon it and explore it for these minerals, in order to gain ownership thereof by

securing possession of them. *Federal Land Bank v. Mulhern*, 180 La. 627, 157 So. 370, 95 A.L.R. 948, and *Frost-Johnson Lumber Co. v. Salling's Heirs et al.*, 150 La. 756, 91 So. 207. They may sell this real right separate from the fee of the realty, or reserve this real right when they sell the land, and, in both instances, a real right in the land exists. They may lease this right to a third person who obtains thereby a personal right."

And in the case of *Arnold v. Sun Oil Co.*, *supra*, at page 401, the Court said:

> "The learned Justice ad hoc, relying on the well established jurisprudence of this court, very aptly pointed out that the provisions of the Revised Civil Code with respect to the law of registry, Articles 2251-2266, have no application in this case for the reason 'that the usual oil and gas lease with a cash or royalty consideration, or both, such as the one presently before us, is a contract of letting and hiring within the meaning of the codal articles, and that the lessee in such a mineral lease obtains an obligatory or personal right only, and **not a servitude on realty or a real right in the land.**'" (Emphasis ours)

In *Kaufman v. Arkansas Fuel Oil*, 133 Fed. (2) 787, 5th Cir., (1943) it was stated:

> "It is settled law in Louisiana that a purchaser of such property (a mineral interest) as this need only go to the conveyance records and is entitled to rely absolutely on their disclosure. He cannot be bound by anything dehors those records or contained in unrecorded instruments. The records alone speak and no other notice will do. Revised Civil Code Article 2266." (Explanation ours)

We believe that it is clear that the mineral grantees are fully protected in their purchases, made on the

strength of the public records. They could not be affected by the cancellation of the compromise agreement as between the plaintiffs and the defendants. Having purchased on the strength of the public records their titles may not be affected by any equities existing between the plaintiffs and the defendants. To hold otherwise would be a refusal to give effect to the Registry Laws of the State of Louisiana. In *Blevins v. Sun Oil Co.*, 110 Fed. (2) 566, 567, 5th Cir. (1940) the Court said:

> "For to permit it would be to permit a secret and unrecorded title, the very kind the simple record system of Louisiana is designed to protect against, to prevail over one who purchased, on the faith of the conveyance records, to which alone purchaser must look."

CONCLUSION

We submit to the Court that under the well pleaded allegations and demands of the original complaint, the District Court may render a judgment either cancelling the compromise agreement insofar as it affects the interest of Marks and the other named defendants, or it may order them to re-convey to the plaintiffs their ill-gotten gains. Such a judgment would not affect any of the mineral grantees who, as we have stated above, are protected not only by their warranties and by the recordation laws of the State of Louisiana, but are also protected by reason of the fact that plaintiffs do not seek to disturb their title. Certainly if the Court cannot grant this full relief under the demands of the complaint it can render a monetary judgment against the defendants for the value of the property which was taken from the plaintiff's. We therefore respectfully submit that the judgment of the United States Circuit Court of Appeals for

the Fifth Circuit is eminently correct and the application for writs of certiorari should be denied.

Respectfully submitted,

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525 Whitney Building,
New Orleans, Louisiana.

DHU THOMPSON,
Bernhardt Building,
Monroe, Louisiana.

CERTIFICATE

I certify that I received notice of the filing of the petition for writs of certiorari in the above matter on November 22, 1955 and that a copy of this brief has been served upon Harry B. Kelleher, Esq., and Thomas F. Jordan, Esq., 1836 National Bank of Commerce Building, New Orleans, Louisiana; George M. Snellings, Jr., Esq., Bernhardt Building, Monroe, Louisiana; W. Dan Files, Esq., Bastrop, Louisiana; E. Leland Richardson, Esq., Reymond Building, Baton Rouge, Louisiana; Wood H. Thompson, Esq., Bernhardt Building, Monroe, Louisiana; George Gunby, Esq., Bernhardt Building, Monroe, Louisiana; and Jerome S. Hafter, Esq., Greenville, Mississippi by placing the same in the United States Post Office at New Orleans, with First Class Postage prepaid, addressed to each of the said attorneys at his post office address.

SAMUEL J. TENNANT, JR.